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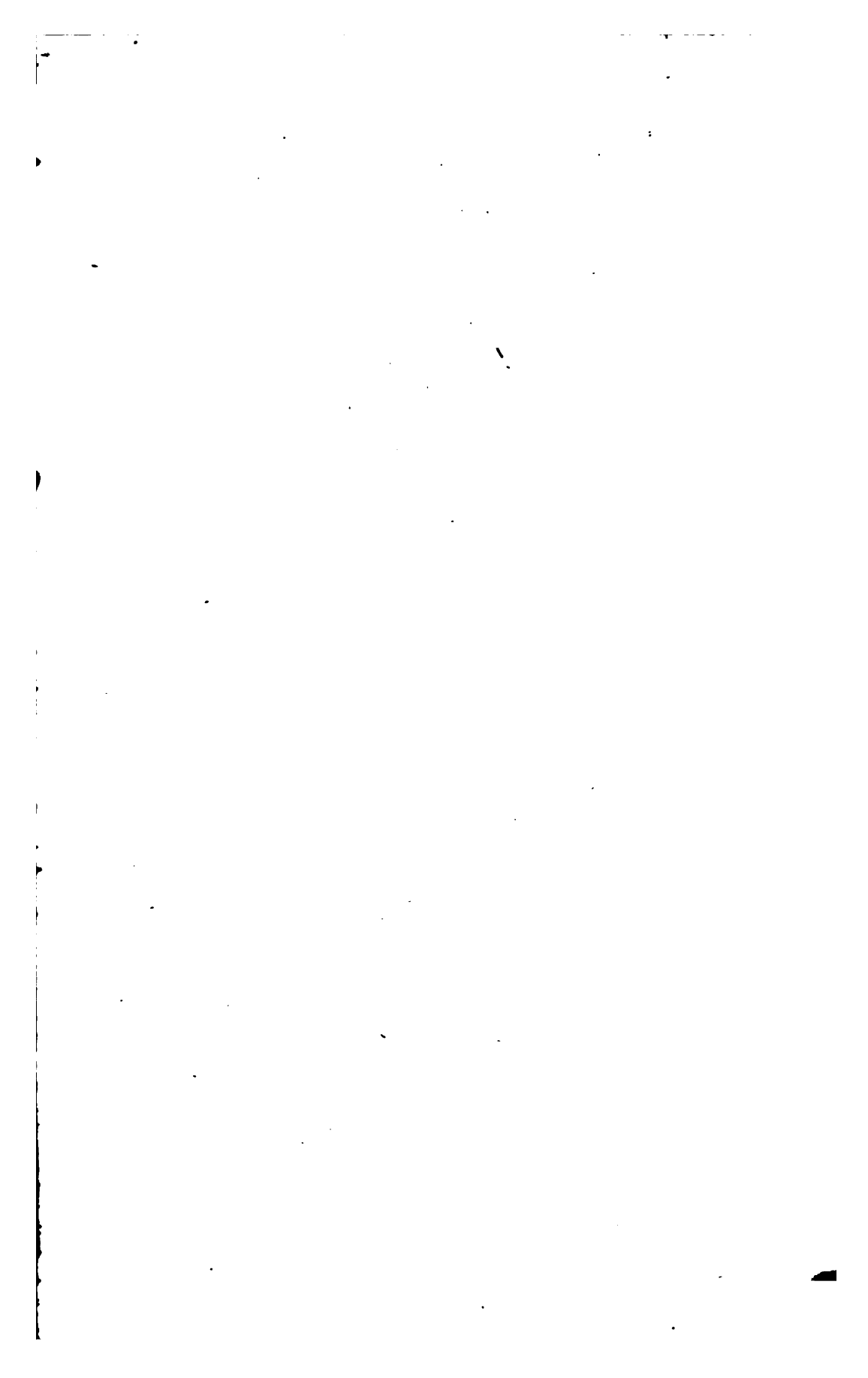
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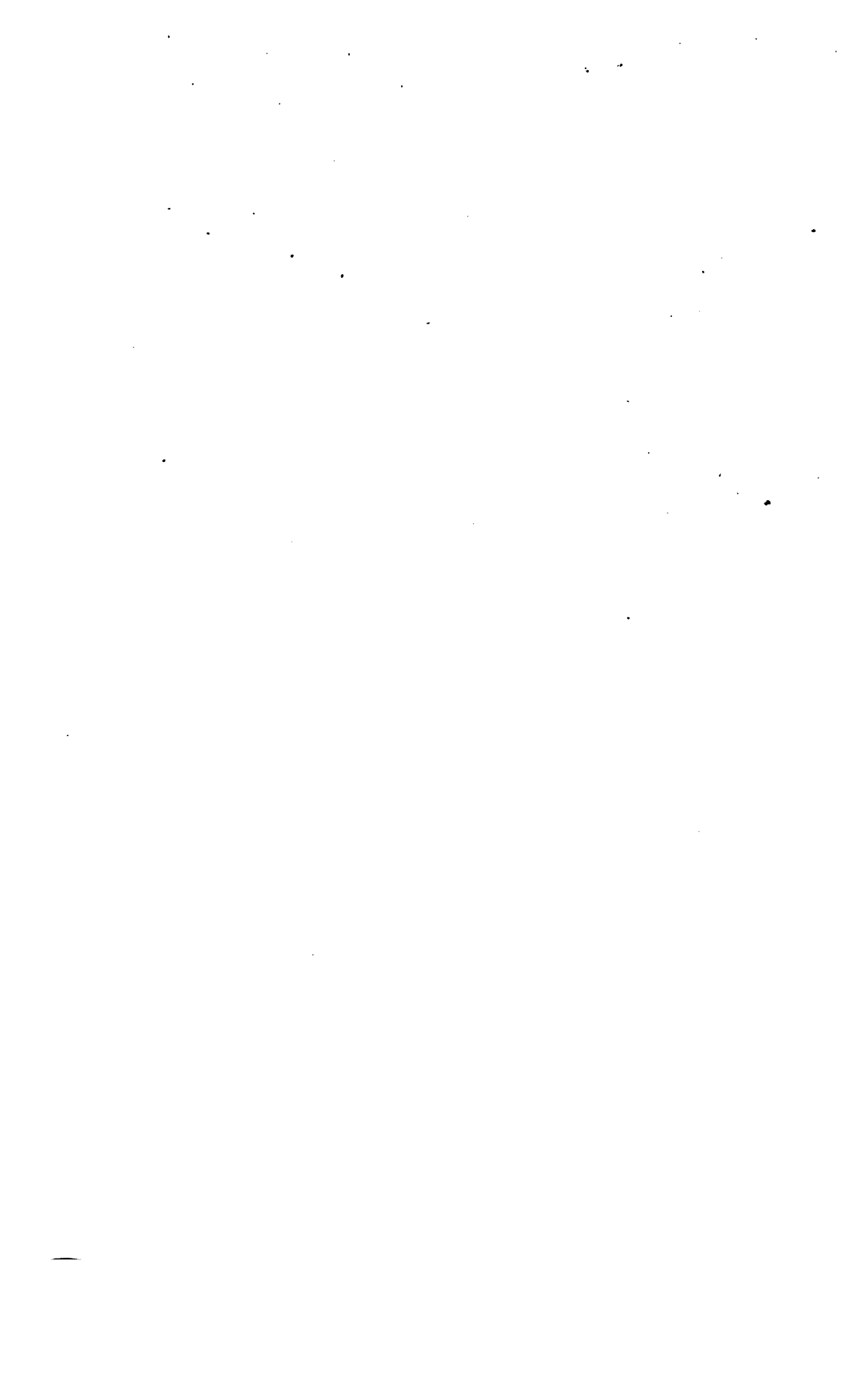
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REPORTS
OF
CASES IN BANKRUPTCY,
ARGUED AND DETERMINED
IN
THE COURT OF REVIEW,
AND ON
APPEAL BEFORE THE LORD CHANCELLOR.
WITH
A DIGEST OF THE CASES
RELATING TO
BANKRUPTCY IN ALL THE CONTEMPORANEOUS REPORTS.

By EDWARD E. DEACON,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. IV.

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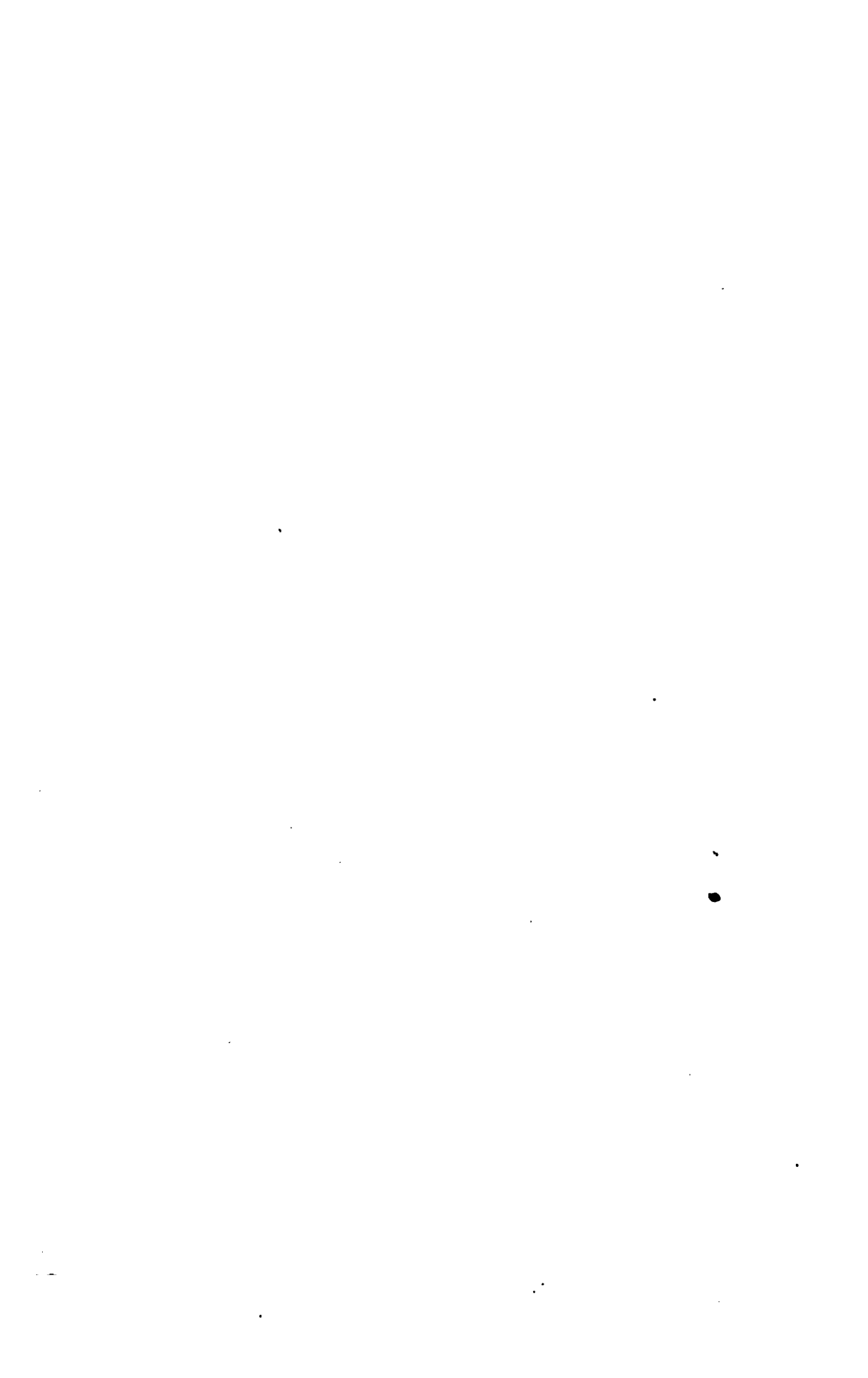
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CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review, &c.

Ex parte TOMSON HANKEY and others.—In the matter
of HENRY ALEXANDER DOUGLAS.

July 25,
August 3,
1838.
Cor. Lord Chan-
cellor.

THIS was an appeal of the assignees of the bankrupt,
against an order of the Court of Review, made the 25th
day of July 1837, on the following

SPECIAL CASE.

The bankrupt, for several years prior to and at the
time of his bankruptcy, carried on business in London,
in partnership with *John Anderson* and *Samuel Ander-
son*, under the firm of *Douglas, Anderson & Co.*; and
other persons carried on business at Singapore, in the
East Indies, under the firm of *Douglas, M^r Kenzie
& Co.*

In June 1835 a society or company, at Ghent, in the
province of East Flanders, called “*La Société de l’In-
dustrie Cotonniere*,” upon the recommendation, and
through the agency of *Douglas, Anderson & Co.*, con-
up the bills to *A.*, and that they could not apply them towards the payment
from *C.* to *B.*

A., through the
agency of *B.*,
consigns goods
to *C.* in India,
for sale, who re-
mits bills to *B.*,
directing him to
pay them over
to *A.* “being
remittance to
account against
A.’s consign-
ment of the
goods;” and *C.*
also writes to *A.*,
advising him of
the remittance
thus made in his
favour to *B.*
Before the bills
reached *B.*’s
hands, he be-
came bankrupt;
at which time
C. was indebted
to him in a
large amount.
Held, that *B.*’s
assignees were
bound to deliver
of the debt due

1838.

Ex parte
HANKEY
and others.

signed to *Douglas, M'Kenzie & Co.* eighty-nine bales of goods for sale, or barter, on the society's account. Such goods were sent through *Douglas, Anderson & Co.*, as the agents of the said society, and their shipping and other charges against the society, in respect of this transaction, amounted to 81*l.* 7*s.* 8*d.*

On the 8th December 1836 separate fiats in bankruptcy were issued against the said *Henry Alexander Douglas*, and the said *John Anderson*, under which they were duly declared bankrupts; and the appellants are the creditors' assignees and the official assignee, under the fiat against the said *Henry Alexander Douglas*. Under this fiat, the joint estate of *Douglas, Anderson & Co.* is administered, by virtue of an order of the Court of Review, dated the 12th December 1836.

In December 1836 *James Clegg* and *Edmund Clegg*, of Watling Street, London, were duly appointed by the said society their agents in this country, in respect of the matters in question; and on the 28th January 1837, a letter was written by one of the appellants, *William Pennell*, addressed to the directors of the said society, and sent to the said *James Clegg* and *Edmund Clegg*, as their agents, of which the following is a copy:—

“ Re *Douglas, Anderson & Co.*

Basinghall Street, London,
28th January 1837.

“ Gentlemen,

“ I beg to acquaint you, that Messrs. *Douglas, M'Kenzie & Co.*, of Singapore, have written to the late firm of *Douglas, Anderson & Co.*, of this city, requesting them to remit you a sum of 1204*l.* 5*s.* 7*d.*, on account of a consignment of ninety bales of frieze goods. In consequence of the bankruptcy of the latter, to whom

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Douglas, M^r Kenzie & Co. are largely indebted, such request cannot be complied with, and you will have to look to the house at Singapore, for a settlement of your account.

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and others,

I am, gentlemen,

Your most obedient servant,

William Pennell, Official Assignee."

On the 15th of June 1837 the said *James Clegg* and *Edmund Clegg* received from *William Pennell*, in an envelope, a letter from *Douglas, M^r Kenzie & Co.* to the said society, dated the 31st December 1836 (such letter being one of the eleven letters mentioned in a letter from *Douglas, M^r Kenzie & Co.* to *Douglas, Anderson & Co.* herein-after set forth), of which the following is a copy:—

" Duplicate. (Original per *Layton*.)

" *Messrs. La Société de l'Industrie Cottonnière, Ghent.*

Singapore, 31st December 1836.

" Gentlemen,

" We confirm our last respects of the 20th instant per *Hersey*, and now beg leave to advise you, that we have this day remitted you in full, through Messrs. *Douglas, Anderson & Co.*, London, viz.

	£	s.	d.
Bills at thirty days' sight, 4s. 6d. ex. .	52	19	2
Bills at six months' sight, 4s. 7d. ex. .	667	5	7½
Ditto. 4s. 8d.	769	14	4
	<hr/>		
	£1489	19	1½
	<hr/>		

which we hope you will find correct. You will observe, that part of the sales are not yet due; but we have, in this instance, been enabled to purchase bills on England at a credit of two and three months, and were desirous

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of seeing your account closed; as our establishment here ceases after this date.

We remain, gentlemen,

Your most obedient servant,

S^d pro *Douglas, M^cKenzie & Co.*

W. F. Lorrain."

The said *James Clegg* and *Edmund Clegg*, as the agents of the said society, having applied for an inspection of the letters and particulars of the remittances received by the assignees from *Douglas, M^cKenzie & Co.*, relating to the said society, without having been able to obtain the same, they, together with the directors and proprietors of the said society, presented a petition to the Court of Review, praying that the assignees of the estate and effects of the said bankrupt might forthwith be ordered to deliver up to them, the said *James Clegg* and *Edmund Clegg*, as the agents for the said society, the several bills of exchange received by them, from the said Messrs. *Douglas, M^cKenzie & Co.*, or the proceeds thereof, if due and paid, the said *James Clegg* and *Edmund Clegg* being ready thereupon to pay for and on behalf of the said society to the assignees, the sum of 81*l.* 7*s.* 8*d.*, the amount of the aforesaid charges for shipping, &c.; and that, if necessary, proper inquiries might be directed, to ascertain whether any other or further remittances had been received by the assignees from the said *Douglas, M^cKenzie & Co.*, in respect of the goods so consigned to them by the said society; and that the costs of and incidental upon the application might be paid out of the bankrupt's estate.

By an order of the Court of Review, made on the 18th July 1837, the assignees were ordered forthwith to permit the petitioners, their solicitors and agent, to in-

spect and take copies, at their own expense, of all bills received by the bankrupt, or by the assignees or any other persons, from *Douglas, M'Kenzie & Co.* to *Douglas, Anderson & Co.*, referred to in the petition, and of all correspondence between the parties relative to such bills, or the matters in the said petition; and it was further ordered, that the said assignees should not in the meantime part with the funds in question.

In pursuance of the last-mentioned order, the said *William Pennell* produced three letters from *Douglas, M'Kenzie & Co.* to *Douglas, Anderson & Co.*, dated respectively 24th August 1836, 17th September 1836, and 31st December 1836, and the bills mentioned or referred to in such letters; all which had been severally received by the appellants, as the assignees of the said *Henry Alexander Douglas*, the bankrupt, subsequent to the 8th December 1836, the date of the fiat against him, at which time none of them had arrived in this country.

The following are copies of the said three letters :—

“ Messrs. *Douglas, Anderson & Co.*, London.

Singapore, 24th August 1836.

“ Dear Sirs,

“ We confirm our last respects of the 12th and 13th ult., per *Elutha*, and are since without any of your esteemed favours. We beg to enclose the following drafts, viz.—

Isaac F. Smith, on *Baring, Brothers* £ s. d.

& Co. at mos. 1000 0 0

Thomas Dent & Co., Canton, on *T.*

Dent & Co., London 189 16 5

Shaw, Whitehead & Co., on *Nicol*,

Duckworth & Co. 161 6 9

£1351 3 2

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 and others.

and will thank you to pay the following sums at same sight, viz.—

	£	s.	d.
To <i>Muir, Brown & Co.</i> , Glasgow	68	17	9
<i>D. Morrison & Co.</i>	24	16	3
<i>G. & W. M'Lellan</i>	79	10	6½
<i>D. Gilchrist & Co.</i>	180	0	0
<i>John Ridgway & Co.</i> , Staffordshire Potteries	108	8	2½
	<hr/> <u>£461 12 9</u> <hr/>		

“ By the *Vanguard*, to sail in about eight days hence, we hope to hand you further remittances along with instructions to what parties the same shall be paid.

We remain, dear Sirs,

Your most obedient servants,

S^d pro *Douglas, M'Kenzie & Co.*

W. F. Lorrain.

“ 3rd not to hand from China.

S^d pro *D., M. & Co.*

W. F. L.”

“ Messrs. *Douglas, Anderson & Co.*, London.

Singapore, 17th September 1836.

“ Dear Sirs,

“ We confirm our last respects of the 24th ult., and have since to hand your esteemed favour of the 14th April, by which we are happy to observe such a favourable report on our shipments of tortoise shells, per *Hero*, and we have now the pleasure to enclose further remittances, viz.—

Douglas, Brothers & Co., four drafts and
 asst. to order for 250*l.*, on your good

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7

selves, @ 4s. 5d. ex. (H. 4528. 30)	1000	0	0
Nine navy bills, @ 3 and 10 mos. @			
4s. 4d. ex. (942. 82)	204	5	7
	<u>£1204</u>	<u>5</u>	<u>7</u>

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 HANEY
 and others.

which amount we will thank you to pay over to the Belgian Company, being remittance to account against their consignment to us of ninety bales of frieze goods. We shall also thank you to pay the said company 889*l.* 10*s.* 5*d.*, which we remitted you in our last, @ 4*s.* 6*d.* ex.

We are, dear Sirs,

Yours faithfully,

S^d pro *Douglas, M^cKenzie & Co.*

W. F. Lorrain.

"Enclosure. Statement of Europe consignments in store."

"Messrs. *Douglas, Anderson & Co.*

Singapore, 31st December 1836.

"Dear Sirs,

"We beg leave to enclose the following bills:—

	£	s.	d.
Sydney government bill, @ 30 pt. . . .	52	19	2
<i>Rodgers on Baring, Brothers & Co.,</i>			
6 m. pt.	266	11	7
<i>Robert Douglas, on your good selves,</i>			
6 mos.	440	14	0
<i>Freeman, on Curling, Young & Co. . .</i>	386	1	1½
<i>Neilson, on Thiggin & Co.</i>	783	14	4
<i>Paterson & Co., on Henderson & Co.,</i>			
four bills at 500 <i>l.</i>	2000	0	0
Ditto, <i>T. Shields & Co., two bills 500<i>l.</i></i>			
and 583 <i>l.</i> 17 <i>s.</i> 9 <i>d.</i>	1083	17	9
Ditto. ditto.	310	10	2
	<u>£5284</u>	<u>8</u>	<u>2</u>

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“ The above bills are belonging to, and for account of, the following parties, and we will thank you to dispose of the same as follows, viz.—

	£	s.	d.
To the Belgian Company the three first-named bills, amounting to . .	720	4	9½
The remaining bills are at the exchange of 4s. 8d. P. H., to be disposed of as follows :—			
To the Belgian Company	769	14	4
Barton & Guestier, Bordeaux . . .	91	5	10
Bernard Phelan, do.	110	1	2½
Daniel Gilchrist & Co., Glasgow . .	906	5	0
To Muir, Brown & Co.	1267	10	2
M'Donald & M'Kay	583	6	8
Donald, Campbell & Co.	57	1	0
James M'Lellan, Manchester . . .	322	9	4
Cotterill, Hill & Co., Walsall . . .	734	16	6
Thomas Baird & Son, Liverpool . .	280	0	0
C. Logane, do.	33	2	8
	<hr/> £5875 17 6 <hr/>		

“ We enclose eleven letters for the above parties, which, after perusal, we shall thank you to forward. You will observe by the above, that we have overdrawn by 591*l.* 9*s.* 4*d.*; but the balance of our late adventures of produce to your consignment will more than cover the said amount.

“ The cargo per *Margaret* has, no doubt, realized a good profit. All Europe consignments are now remitted for, with the exception of Messrs. *Macdonald & Mackay*, whose goods are all disposed of, and whose ac-

count sales we are now preparing, and shall, if possible, hand the same to-day, along with further remittance.

We remain, dear Sirs,

Your most obedient servants,

S^d pro *Douglas, M'Kenzie & Co.*

W. F. Lorrain."

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The nine navy bills mentioned in the letter of 17th September 1836, and the bills on the Sydney government, and on *Baring Brothers*, mentioned in the letter of the 31st December 1836, and all the other bills remitted as aforesaid to *Douglas, Anderson & Co.* (except the bills drawn by *Douglas Brothers* and *Robert Douglas*) were specially indorsed by *Douglas, M'Kenzie & Co.*; and the four bills, amounting together to 1000*l.*, mentioned in the said letter, and the bill of *Robert Douglas*, were drawn upon the said firm of *Douglas, Anderson & Co.*; for which it was not proved that any consideration was given; and such bills were never accepted.

The petition was heard on the 25th July 1837 before the Court of Review; which, being of opinion that such remittances had been made to *Douglas, Anderson & Co.*, to be specially appropriated by them to the said society, ordered that the said assignees should forthwith deliver up or pay to the said *James Clegg* and *Edmund Clegg*, as the agents for and on behalf of the said society, the several bills received by them from the said Messrs. *Douglas, M'Kenzie & Co.*, or the proceeds thereof, to the same amount respectively, as follows:—the three bills mentioned in the letter of the 24th August 1836, or the part proceeds thereof, to the amount of the sum of 889*l.* 10*s.* 5*d.*, mentioned in the letter of

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the 17th of September 1836 ; likewise the four drafts or bills, each for 250*l.*, mentioned in the same letter of the 17th of September 1836 ; and the nine navy bills in the same letter, amounting together to the sum of 204*l.* 5*s.* 7*d.* ; the said two last-mentioned sums making together the sum of 1204*l.* 5*s.* 7*d.* ; also the three bills first mentioned in the letter of the 31st December 1836, amounting together to the sum of 720*l.* 4*s.* 9½*d.* ; and the further sum of 769*l.* 14*s.* 4*d.*, out of the proceeds of the remaining bills mentioned in the same letter, less so much of the sum of 591*l.* 9*s.* 4*d.*, also mentioned in the said letter, as the said sum of 769*l.* 14*s.* 4*d.* bears in proportion thereto with the sums therein directed to be paid to the other persons named therein, according to the respective amounts set opposite to their respective names ; the company, by their said counsel, thereby undertaking to submit to such order (if any) as the Court may think fit to make, on the application of the said Messrs. *Douglas, M^r Kenzie & Co.*, relating thereto : and it was ordered, that the costs of the said respondents, the assignees, of and occasioned by the said application, should be paid out of the general estate of the [said bankrupts, such costs being first taxed and ascertained by the proper officer of the said Court.

Mr. *J. Russell*, and Mr. *Bethell*, in support of the appeal. Although the bills were remitted by *Douglas, M^r Kenzie & Co.*, for the use of the Belgian house, yet there was no proof of assent, either on the part of the Belgian company, or by *Douglas, Anderson & Co.* ; and as the firm of *Douglas, M^r Kenzie & Co.* were indebted to *Douglas, Anderson & Co.* to the full amount of the bills, the latter had a right to retain them in satisfaction

of their debt; *Grant v. Austen* (a); nor could any action of trover, nor for money had and received, be maintained by the Belgian house against *Douglas, Anderson & Co.*, in respect of these bills; *Williams v. Everett* (b). As to the first sum remitted, if *Douglas, Anderson & Co.* had become bankrupts, and were indebted to *Douglas, M^cKenzie & Co.*, the latter firm could only have proved for the amount; there being nothing in the transaction between the parties to give the Belgian company any lien on these particular bills; *Ex parte Heywood* (c). The Belgian company could have no lien whatever; for until there was an express appropriation of the bills to their credit, the order was recoverable by *Douglas, M^cKenzie & Co.*; *Gibson v. Minet* (d). So long as the firm of *Douglas, M^cKenzie & Co.* were indebted to *Douglas, Anderson & Co.* in a sum exceeding the amount of these bills, and the latter firm had not assented to any directions as to the remittance of the bills, they had a right to appropriate the remittance towards payment of their own debt. A mere direction from a principal to his agent to pay over proceeds to a third person, his creditor, gives no right or interest to the subject of such mandate, although the agent may consent to perform it; *Scott v. Porcher* (e). But where there is no assent of the agent, it is clear that no interest can pass to the third party. Thus, if *A.* has overdrawn his account at his bankers, and remits them a sum of money, with directions to pay the amount to *B.*, the bankers may stop the money, and appropriate it to the payment of their own debt. There is a wide distinction between the

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(a) 3 Pri. 58.

(b) 14 East, 582; *Wedlake v. Harley*, 1 Cr. & J. 83.

(c) 2 Rose, 355.

(d) *Ryan & M.* 68.

(e) 3 Mer. 652.

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mere mandate of the principal, and a mandate coupled with the assent of the agent. In the present case, there was no communication between the consignees, and the persons to whom the proceeds of the bills were directed to be paid. *Douglas, Anderson & Co.* were the English bankers of the house at Singapore, and the medium through which they made payments to their creditors. The first remittance of the 24th August contained no directions to pay the Belgian company any sum whatever, but merely certain other specified debts. If a part, therefore, of this remittance was appropriated specifically to the payment of those debts, still there remained a balance, which was applicable to the general account of the London house. The letter of the 17th September brought, indeed, a direction to pay a specific sum to the Belgian company. But upon what principle can a debtor abroad make his creditor in this country answerable to a third person, by directing him to pay over a sum to such third person, which the creditor could appropriate to the payment of his own debt? This letter was, in fact, nothing more than a request of the debtor to the creditor to lend him a further sum of money. But before the letter was received, the London house had become bankrupt.

In this case, however, we contend that the Court of Review had no jurisdiction to make the order, which is the subject of this appeal; for *Douglas, M'Kenzie & Co.*, besides being utter strangers to the bankruptcy, are out of the jurisdiction of the Court. The Court of Review, therefore, had no power to make any order affecting their right to have the bills restored to them. The Belgian house, also, are equally beyond the jurisdiction of the Court; and if they once get possession of the

fund, this Court has no means of getting it back again, to satisfy any claim that may be made by *Douglas, M'Kenzie & Co.*

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Mr. Swanston, Mr. Wigram, and Mr. K. Parker, for the respondents. It may be assumed as a fact established by the evidence, that the bankrupts' house were the agents between the house at Ghent, and the house at Singapore. The consignments of goods from the house at Ghent to the house at Singapore, were made expressly through the agency of the London house; and the remittances from the Singapore house take the same course. In the letter of the 31st December, 1834, certain of the bills thereby remitted were expressly declared to be, as "belonging to and for account of the Belgian company." After such an express appropriation, it would be against equity and conscience, that the London house should pay their own debt with the proceeds of those bills, which were thus declared to belong to the Belgian company. In *Williams v. Everett* there was no agency between the bankers, and the party to whom the money was ordered to be paid; and the ground of the decision in that case was, that there was no privity between that party and the bankers; and there was also an express dissent of the bankers to apply the money in discharge of the debt due to that party. The present case comes within the principle of the decision in *Bailey v. Culverwell (a)*, and *Lilly v. Hays (b)*. In the last case, Mr. Justice Patteson says, "Suppose that a debtor sent money to a general agent for the creditor, would there be any doubt that, as soon as the agent received it, he would be accountable to the creditor for it, as money had and received to

(a) 8 B. & C. 448.

(b) 5 Ad. & E. 548.

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his use?" That is just the present case. The question may be tried by the mode in which these parties were related to each other; 1, As between *Douglas, Anderson & Co.*, and *Douglas, M'Kenzie & Co.*; 2, As between *Douglas, Anderson & Co.*, and the Belgian company; 3, as between *Douglas, M'Kenzie & Co.*, and the Belgian company. As between the first two parties, it is clear, that any money or bills remitted by *Douglas, M'Kenzie & Co.* to their agents *Douglas, Anderson & Co.*, might be appropriated by the former to the payment of their own debts to a third party. All the cases, and more especially *Buchanan v. Findlay* (a), establish the position, that where property is remitted to A. for a particular purpose, A. has no right to deal with it as his own, nor even to set it off against a debt due from the remitter, in the event of his bankruptcy; and *Young v. The Bank of Bengal* (b) is to the same effect. If *Douglas, Anderson & Co.* had paid over the amount of these bills to the Belgian company, that would have been a good discharge to them, as against *Douglas, M'Kenzie & Co.*—2ndly, As between *Douglas, Anderson & Co.* and the Belgian company. *Douglas, Anderson & Co.* negotiated the consignments of goods made by the Belgian company to the house at Singapore; they were therefore agents for the Belgian company, as well as for *Douglas, M'Kenzie & Co.* In all the cases cited by the other side, there was a want of privity between the consignee and the party to whom the proceeds were directed to be paid. That is the great distinction in this case. But the Courts will lay hold of the slightest circumstance, to find agency and privity between two parties, where one has received money for the use of another, which he ought not in

(a) 9 B. & C. 738.

(b) 1 Deac. 622.

conscience to withhold from him. Thus, where money is paid to A. for a specific purpose, and he does not immediately repudiate the purpose for which it is paid, he will be taken to have acquiesced in it; and an action for money had and received will lie against him by the party for whose use it was paid; *De Bernales v. Fuller* (a); —3rdly, As between *Douglas, M'Kenzie & Co.* and the Belgian company, *Douglas, Anderson & Co.* were mere stakeholders. *Douglas, M'Kenzie & Co.* having given an authority to the agents of their creditors to appropriate a certain fund towards the payment of the debt, could not afterwards revoke such authority, because it was an authority coupled with an interest; *Gaussen v. Morton* (b), *Ex parte South* (c). As to the argument of the other side, that because the letter of the 24th August appropriated only a part of the bills thereby remitted, *Douglas, Anderson & Co.* had a right to retain the balance towards a liquidation of their own debt, and that the subsequent letter of the 17th September, which directed *Douglas, Anderson & Co.* to pay the Belgian company the balance unappropriated by the former letter, was too late,—we contend, that the whole fund remitted by *Douglas, M'Kenzie & Co.* was subject to instructions from the remitters; and if the two letters are connected, which they must be to have a proper operation, it is clear what the intentions of the remitters were; for the last letter contains these express directions,—“We will also thank you to pay the said company 889*l.* 10*s.* 5*d.*, which we remitted you in our last.”

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Mr. *J. Russell* in reply. The letter so much relied

(a) 9 East, 590 (note).

(b) 10 B. & C. 431.

(c) 3 Swanst. 392.

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on amounted to no more than the remittance of a mass of bills to the credit of *Douglas, M'Kenzie & Co.*, with a request that *Douglas, Anderson & Co.* would make certain payments out of the proceeds. No case of appropriation can arise, unless by the express directions of the consignor, coupled with an assent thereto by the consignee, and a promise by him to the party for whose benefit the appropriation is to be made. Appropriation, also, must be under such circumstances as will cause a discharge between the consignor and the creditor. In the present case, all these ingredients, except the first, are wanting.

Lord COTTENHAM, C.—The special case states, that the bankrupts were agents for the house at Ghent, for the purpose of the shipment of goods; and that they had a charge of 81*l.*, as such agents, against the Ghent house, in respect of the present transaction. On the 24th August 1836, *Douglas, M'Kenzie & Co.* send to *Douglas, Anderson & Co.* bills amounting to 1351*l.* 3*s.* 2*d.*, with directions to make certain payments, altogether about 461*l.* 12*s.* 9*d.*, leaving therefore a balance of 889*l.* 10*s.* 8*d.*, and stating that they should shortly send further remittances, with instructions to what parties the same were to be paid. Accordingly on the 17th September 1836, they remit to the bankrupts drafts on themselves, equal to 1000*l.*, and nine navy bills equal to 204*l.* 5*s.* 7*d.*, which they desire them to “pay over to the Belgian company, being remittances to account against their consignments to us of ninety bales of piece goods.” And they add, “We shall also thank you to pay to the said company 889*l.* 10*s.* 5*d.*, which we remitted you in our last.” On the 31st December 1836, they sent many

other bills, and after enumerating several, they say, "The above bills are belonging to and for the account of the following parties, and we will thank you to dispose of the same as follows; viz. to the Belgian company the three first-named bills, amounting to 720*l.* 4*s.* 9½*d.*; the remaining bills are to be disposed of as follows: to the Belgian company 769*l.* 14*s.* 4*d.*;" and after appropriating the others, they say, "We enclose eleven letters for the above parties, which after perusal we shall thank you to forward." Of these eleven letters, one was to the Belgian house of the same date, the 31st December, stating, "We advise you, that we have this day remitted you in full, through Messrs. *Douglas, Anderson & Co.*;" and then it enumerates the bills as stated in the last letter, and observes, that part of the sales were not due, but that they had purchased bills on England, as they were desirous of seeing their account closed. Here it is to be observed, that *Douglas, M'Kenzie & Co.* had received the goods of the Ghent house through the medium of the bankrupts, who seem to be the agents of that house. By the letter of the 17th September, *Douglas, M'Kenzie & Co.* remit certain bills and drafts for that house, and direct the bankrupts' house to pay the balance, of which, by the letter of the 24th August, the remitters had reserved to themselves the right to direct the application. The remittance of the 31st December is still stronger; because the bankrupts, at the time they received it, also received the letter to the Ghent house, in which *Douglas, M'Kenzie & Co.* tell the Ghent house, that the remittance is to them through the bankrupts' house; and the letter to the bankrupts directs them specifically to appropriate and pay certain bills to the Ghent house. It remains to be seen, there-

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fore, whether under all the circumstances the Ghent house has acquired the right to these remittances. That the bankrupts' estate has not any right to them is clear; they are remittances for particular purposes, and with specific declarations; and if the party receiving them had been exclusively the agent of the remitters, he could only have the choice of carrying the instructions into effect, or returning the money to the remitter. The remittances in this case were not received till after the bankruptcy. The assignees, therefore, who are the appellants, have no interest in the question; and the order of the Court of Review perhaps unnecessarily reserved any question on behalf of *Douglas, M'Kenzie & Co.* It is clear, that a remitter can never dispute the application of the remittances according to his directions, unless he had recalled the authority before the directions were effected, even in a case in which he has power so to do; and, in this case, there has been no such attempt to recall the directions. But what power have *Douglas, M'Kenzie & Co.* to alter the destination of these remittances? *Williams v. Everett*, and other cases proceeding upon the same principle, were relied upon by the appellants; but they only prove, that a party, for payment of whose debt money is remitted to an agent of the remitter, has no right of action against such agent, unless the agent has done some act to create a contract between himself and the party to be paid. And how little will be sufficient for that purpose appears from the cases of *Lilly v. Hays*, and *De Bernales v. Fuller*. *Williams v. Everett*, and *Bailey v. Culverwell* show that the rule is confined to cases, in which the holder of the property is solely the agent of the remitter; and that circumstances much slighter than those in this case will

give to the party, to whom payment was intended, a claim upon the fund. In the case of *De Bernales v. Fuller, De Bernales*, the holder of the bill, had no personal communication with *Fuller*, who received the money from the acceptor for payment of the bill; but, as Lord *Ellenborough* explains the case in *Williams v. Everett, Fuller* was in effect to be considered as the agent for *De Bernales*, through the intervention of *De Bernales* and *Barker*, who had placed the bill with *Fuller* for the purpose of receiving payment; so that *Fuller*, being clearly the agent of the acceptor from whom he received the money, and having (by thus possessing himself of the bill) constituted himself agent for the holder, was held liable to pay the amount to the holder. In *Bailey v. Culverwell*, the goods had become the property of the purchaser, and the brokers, who had been the agents for the sale, held them for him, and their duty to the seller was discharged; but the acceptor of the bill given in payment having become bankrupt, the brokers applied to the purchaser for further security, and he then directed them to sell the goods and pay the bill; and their direction was held to give the original seller a right to have the bill paid out of the proceeds of the goods, although there was no evidence of his having been at all privy to the transaction; upon the ground, that the brokers were to be considered as his agents. In the present case, the bankrupts were agents for the Ghent house, for the purpose, at all events, of the shipment. *Douglas, M'Kenzie & Co.*, though they corresponded with the Ghent house, received the goods through the bankrupts' house, and naturally remitted the proceeds through the same channel, describing the bills remitted in the letter of the 31st December, as *belonging*

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to the Ghent house. It appears to me, that the bankrupts were not merely the agents of the remitter, as in *Williams v. Everett*, but that there was quite sufficient to constitute such a privity between them and the party to whom the payment was to be made, to entitle that party to claim these remittances, within the authority of the cases to which I have referred. The decision, therefore, of the Court of Review was correct, and the appellants must pay the costs of this appeal.

Judgment affirmed, and appeal dismissed, with costs.

Ex parte HAINES.—In the matter of JOHN BARNETT, the elder, and JOHN BARNETT, the younger.

Westminster,
Nov. 5, 1838.

A. deposits deeds with B., by way of equitable mortgage, and C. becomes his surety for the payment of any balance due. Separate fiats issue against A. and C.; and under the fiat against C., B. is appointed sole assignee. B., as equitable mortgagee, petitions for the usual order for the sale of the property. Held, that before such order could be made, some person must be chosen by C.'s creditors, to protect their interests.

THIS was the petition of equitable mortgagees, for an account to be taken of what was due to them, and for a sale of the property on the usual terms. The petitioner was the acting public officer of a joint stock banking company, called the Bank of Birmingham. *John Barnett* the elder was a customer of the Bank, and being largely indebted to them upon his banking account, on the 8th May 1833, deposited with the Bank the title-deeds of some freehold property at Birmingham Heath, of which he was seised in fee, accompanied by an agreement in writing, by which it was declared that the deeds were deposited as a security to the Bank for the debt then due, and for any sum of money which might become due, to them from *John Barnett* the elder, on the balance of his account, and for any bills of exchange or promissory notes bearing his name, which

were then or might be in the hands of the Bank, not exceeding the sum of 1200*l.*; and it was also declared, that the sum then due, or to become due, from *John Barnett* the elder to the Bank, should be a charge on the said freehold premises.

The Bank having called upon *John Barnett* the elder for further security, *John Barnett* the younger, on the 10th December 1835, gave to the Bank a guarantee for the payment of what then was, or thereafter might become, due to them from *John Barnett* the elder. And on the 8th February 1836, *John Barnett* the elder, at the request of the Bank, and in order the better to secure the balance of his banking account, to the amount of 5,000*l.*, deposited with them two several indentures of demise of certain property in the county of Warwick, dated respectively the 30th May 1834, and the 27th July 1835, and a counterpart of an indenture dated the 31st December 1834, being an underlease of part of the property comprised in the indenture of the 30th May 1834. Previously, however, to this deposit, *John Barnett* the elder had agreed to sell to *John Barnett* the younger his estate and interest in the premises comprised in the indentures of the 20th January 1831, the 30th May 1834, and the 27th July 1835; and therefore *John Barnett* the younger became a party to the agreement entered into, upon the occasion of the last-mentioned deposit.

By this agreement, dated the 8th February 1836, and made between *John Barnett* the younger, of the first part, *John Barnett* the elder, of the second part, and the trustees of the bank of Birmingham of the third part, *John Barnett* the younger, as an inducement to the bank to continue the account of *John Barnett* the

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elder, declared and agreed, that the several indentures of the 30th May 1834, and the 27th July 1835, and also the other indenture of the 31st December 1834, were deposited with the Bank as a security for the repayment to them of all sums of money which then were, or thereafter should be, due from *John Barnett* the elder to the Bank, upon his banking account, or upon any of the accounts particularized in a certain agreement, or guarantee, of *John Barnett* the younger, dated the 10th December then last. And *John Barnett* the elder, and *John Barnett* the younger, thereby severally declared and agreed, that the said indenture, dated the 20th January 1831, should remain in the custody of the bank, for the like purposes as were therein declared concerning the leasehold deeds. And, as a further security to the Bank, *John Barnett* the younger thereby also agreed, that counterparts of all leases of the premises, when granted, and also certain deeds and evidences of title relating to certain freehold hereditaments in George Street, Birmingham, conveyed, or then about to be conveyed, to *John Barnett* the younger, should, as soon as completed, be deposited in the custody of the Bank, and should be subject, in every respect, to the provisions of the agreement on the part of *John Barnett* the younger, so far as the same could be applicable thereto. And *John Barnett* the younger, and *John Barnett* the elder, thereby agreed to execute, upon demand, to the trustees of the Bank, good and valid mortgages of the leasehold premises, as well as of the freehold hereditaments, free from all incumbrances, excepting any underleases which might have been granted thereout, and to deduce good and marketable titles to the premises. And *John Barnett* the younger also agreed, that all expenses incident

to such mortgages and deduction of title, and to the agreement, should be borne and paid by him, and that the mortgages should be prepared by the Bank, and should contain powers or trusts for sale, and all other provisions and conditions usual in mortgages of the like nature. And it was thereby agreed, that in the meantime, and until the mortgages should be executed, the agreement should create a good and valid lien or charge upon the premises, to the extent of a sum not exceeding at any time, from time to time, the sum of 5,000*l*.

On the 12th November 1836, it was verbally agreed between *John Barnett* the elder, *John Barnett* the younger, and *James Pearson* as manager and on the behalf of the Bank, that 1000*l*. should be raised by mortgage of the premises comprised in the indentures of the 30th May 1834, and the 31st December 1834, and should be applied in part payment of the money then owing to the Bank by *John Barnett* the elder; and it was also agreed, that, subject to the title of the intended mortgagee in respect of the 1000*l*., and the interest thereof, the deeds and premises should be charged with the payment unto the Bank of the money from time to time owing by *John Barnett* the elder, on the balance of his banking account, not exceeding 5,000*l*. And in order to enable *John Barnett* the elder, and *John Barnett* the younger, to raise the 1000*l*., the Bank delivered unto them the indentures of the 30th May 1834, and the 31st December 1834, for the purpose of being delivered to the mortgagee; subject to whose mortgage the Bank were to retain their security.

In pursuance of this agreement, the 1000*l*. was raised by way of mortgage on the premises comprised in the indentures of the 30th May 1834, and the 31st December

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1834; and the premises were assigned, and those deeds delivered, to *Paul Moore*, the mortgagee, as a security for that sum, and interest. On this occasion, the solicitors of the Bank prepared the draft of a charge to the Bank on the premises comprised in those deeds, subject to the mortgage of 1000*l.*, charged thereon to Mr. *Moore*; and on the 4th January 1837, they forwarded the same to *Barnett* the elder, for his perusal and approval; who, on the 6th January 1837, returned the draft, accompanied by a letter from *Barnett* the elder, as follows:—

“ To the Directors of the Bank of Birmingham.

“ Gentlemen,

“ When you consented to let me have the leasehold writings as to property in Reservoir Lane, in order to mortgage the same to Mr. *Paul Moore* for 1000*l.*, and interest, I distinctly stated to you, that it was my intention to sell the premises; and that whatever monies were coming to me, after payment of the principal, interest, and all expenses, should be paid by me to your bank; and I beg to repeat, that from that intention I have never varied for a moment; I shall abide thereby.

In order to satisfy you that such is my intention, I have requested Mr. *Eyre Lee* to attest my signature to this letter.”

The petition stated, that the Bank, relying upon this letter, did not press for the immediate execution of any instrument, charging the premises mortgaged to *Moore* with the money then due to the bank by *Barnett* the elder, on the balance of his banking account; and that *Moore* was informed of the above-mentioned securities;

and that it was the intention of the Bank, and both the bankrupts, that the Bank should relinquish their lien on the indentures of the 30th May 1834, and the 31st December 1834, and their equitable charge on the premises therein comprised, only so far as might be necessary for the purpose of securing the 1000*l.*, and interest.

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On the 10th April 1838, a fiat issued against *John Barnett* the younger, and the petitioner was appointed sole assignee: and on the 16th April 1838, a fiat issued against *John Barnet* the elder, when he was indebted to the Bank in the sum of 3,656*l.* 10*s.* 11*d.*

It appeared, that *Barnett* the younger had not been served with the petition.

Mr. J. Russell, and *Mr. J. E. Armstrong*, in support of the petition.

Mr. Swanston, contra.—Although the memorandum of agreement of the 8th February 1836 is admitted to have been a valid security, at the time it was entered into between these parties, yet the Bank have so dealt with it, that they are not now entitled to avail themselves of it; for, after having parted with the possession of the title-deeds, and returned them to the *Barnetts*, they cannot be considered as equitable mortgagees of the property contained in such deeds.

ERSKINE, C. J.—*Barnett* the younger appears to have some interest in the property, and is a party to the agreement of the 8th February 1836, as well as to the subsequent arrangement with the Bank. Should not therefore some counsel be instructed to appear for him, to consent to the order prayed by this petition?

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Mr. *Russell*.—There can be no interest remaining in *Barnett* the younger, after the issuing of the fiat against him, and the appointment of the petitioner as assignee under that fiat; for the petitioner takes all such interest as *Barnett* the younger had in the property in question, and is therefore competent to ask for the present order, and to bind his bankruptcy by the effect of it. In the character of assignee, he is perfectly competent to consent, on the part of *Barnett* the younger, that all such interest as he had in this property should be dealt with as prayed, for the benefit of the Bank. The assignee is bound, of course, to take care that no injustice is done to *Barnett* the younger; for otherwise he would himself incur personal responsibility.

The COURT said, that it was impossible to deny that *Barnett* the younger had an interest in the question, of which his creditors would have an option to avail themselves, if they thought fit. And that notwithstanding the petitioner was assignee under the fiat issued against him, yet, as the public officer of the Bank, he had no other interest under the petition but to obtain the order as prayed, for the benefit of the Bank. Various questions also might arise in regard to the bills, as between the two estates of the two *Barnetts*; among others, it might be insisted, that the mortgage to *Moore* discharged the suretyship of *Barnett* the younger. The Court, therefore, cannot be satisfied by the mere consent of the party, whose private interest it was to procure an order for the sale of this property, that the creditors at large were willing that such an order should be made.

The ORDER was, that the petition should stand

over, for the purpose of calling a meeting of the creditors of *Barnett* the younger, to institute an enquiry as to the interest which he had in the property in question; and to appoint persons, in the nature of assignees, to protect such interest as was found to exist. The petitioner not to interfere in such meeting or choice.

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Ex parte GEORGE POLLARD.—In the matter of THOMAS COURTNEY and GEORGE COURTNEY.

THIS was an appeal from a decision of the Court of Review, upon the following

SPECIAL CASE.

The above-named bankrupts, together with *Thomas Courtney* the younger, for many years carried on business in partnership together in London, and at Kircaldy in Scotland, as clothiers.

A piece of land at Kircaldy was purchased, in the name of the said *Thomas Courtney* the younger, with the monies of the partnership and for partnership purposes; and the conveyance was made to the said *Thomas Courtney* the younger, who resided and conducted the business of the said partnership in Scotland.

By an instrument called a disposition or assignment, land, by contracting parties domiciled in this country, which was also the domicile of the assignees under the bankruptcy, the estate was charged with the equitable mortgage, and that the assignees were bound to pay to the creditor the amount of the proceeds of the sale of the estate. Reversing judgment in *Ex parte Pollard*, 2 Deac. 367.

Westminster,
coram Lord
Chancellor,
August 8th and
November 6th
1838, and Jan-
uary 20th 1840.

The bankrupts deposited with a creditor the title deeds of a real estate in Scotland, accompanied with a written agreement to secure the payment of the general balance; both parties being resident in England, where the transaction itself took place. By the law of Scotland, no lien or equitable mortgage on real property is created by such a deposit. *Held*, nevertheless, that the contract being made in Eng-

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bearing date at Kircaldy the 9th of March 1815, under the hand of *Richard Joseph*, the said piece of land was sold, alienated, and disposed of, to and in favour of the said *Thomas Courtney* the younger, his heirs and assigns, heritably and irredeemably, by the description therein mentioned; and of such piece of ground and appurtenances, heritably and irredeemably, heritable estate and seisin, real, actual and corporeal, was duly given and declared to the said *Thomas Courtney* the younger, on the 10th day of October 1815; as is shewn by the instrument of seisin, in favour of the said *Thomas Courtney* the younger, bearing date the 10th day of October 1815, and duly recorded in the first book of the New Particular Register of Seisins, Reversions, &c. for the Burgh of Kircaldy, conformably to act of parliament.

The said partnership firm afterwards built and erected upon the said piece of land certain buildings, the expenses of which were defrayed out of the partnership funds; and the business of the said partnership was carried on upon the said premises, until the death of the said *Thomas Courtney* the younger, which took place in the year 1817; and from that time the above-named bankrupts continued to the time of the bankruptcy to hold and occupy the same premises, as part of their partnership property, and carried on their business there, and expended further large sums of money in erecting other suitable buildings for the purpose of their said trade, and on the partnership account.

The said bankrupts, after the death of the said *Thomas Courtney* the younger, and before their own bankruptcy, that is to say, on or about the 13th day of March 1832, being then largely indebted to the appellant, in order to induce him to give further credit, delivered to and depo-

sited with the appellant the said instrument called a disposition or assignment, bearing date the 9th day of March 1815, and the said instrument of seisin dated the 10th day of October 1815, being the title deeds of the said piece of land; and also a certain memorandum in writing, signed by them, in the words and figures following:—

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“ London 13th March 1832.

“ Mr. *George Pollard*, trading under the firm of  
*John Pollard & Co.*

“ Sir,

“ We, the undersigned *Thomas Courtney* and *George Courtney*, do herewith deposit in your hands a certain disposition or assignment, dated 9th of March 1815, together with a certain instrument of seisin, dated 10th of October 1815, whereby certain lands are vested in *Thomas Courtney junior*, deceased; but inasmuch as the said property was purchased out of the partnership funds, and for partnership purposes, and we, the undersigned, having since become the legal and only owners of the said property, do hereby give you a lien thereon for general balance of all or any monies that now are, or may hereafter become, due to you from us, to the extent of 2000*l.*; and we agree, that you shall stand in the nature of equitable mortgagee thereof; and on demand, we further agree to make, do, and perfect all such acts for the better securing to you of any such monies as aforesaid.

We are, Sir,

*Thomas Courtney,*  
*George Courtney.”*

The appellant, relying upon the security of the hereditaments so charged to him as aforesaid, continued to

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give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th day of December 1832; at which time the appellant was a creditor for the sum of 1927*l.* 4*s.* 6*d.*; and in respect of that sum the appellant considered himself, and claimed to be, an equitable mortgagee of the said hereditaments.

The said *Thomas Courtney*, who was the youngest son of his father, having died without descendants, and without having made any disposition of the hereditaments in question, the same, according to the law of Scotland, devolved on the above-named bankrupt *George Courtney*, who was his immediate elder brother, as his heir of conquest.

The appellant preferred his petition in this matter to the judges of the Court of Review, setting forth the matters above stated, and further that under such circumstances he was advised, that inasmuch as the hereditaments in question legally descended unto the said *George Courtney*, as the heir-at-law of the said *Thomas Courtney* deceased, subject to the equities aforesaid in favour of the partnership firm, the same hereditaments were well and effectually mortgaged in equity to the appellant by the aforesaid memorandum of deposit, and that the appellant was then entitled to go before the Commissioner, and to take an account of principal and interest which might be due and owing to him upon or under his aforesaid mortgage security, and to have the same hereditaments sold; and thereupon prayed, amongst other things, that it might be declared by the Court that the appellant was equitable mortgagee of the same hereditaments at Kircaldy, for the principal sum of money which was due and owing to him by the said *Thomas Courtney* the elder and *George Courtney*, at or before the date of the fiat of bankruptcy against them, and the

interest thereon, and that the same hereditaments might be ordered to be sold accordingly in the usual manner, and that all necessary directions might be given for the necessary and proper measure for taking up the title to the said hereditaments according to the law of Scotland, and for the conveyance of the said hereditaments to the purchaser or purchasers thereof; and that all proper and necessary parties might concur in, and do and execute, all proper acts and deeds for that purpose; and for further consequential directions.

The said petition came on to be heard before the judges of the Court of Review on the 29th day of April, and 2nd of May 1837; when, upon reading the affidavits filed in the matter, and hearing the admissions and arguments of the counsel for the parties, the Court found, that by the law of Scotland no lien, or equitable mortgage, on the estate in question, was created by the deposit of the title deeds and the written memorandum in the petition mentioned; and expressed its opinion, that on that account the Court could not make the Order prayed for. The case, however, was allowed to stand over for further consideration, but on the 18th day of July following the chief judge stated the judgment of the Court to be, that the said petition should be dismissed, with costs; and an Order has been drawn up accordingly.

The appellant conceives himself aggrieved by such dismissal of his petition, and submits that the prayer thereof ought to have been granted, and therefore appeals to the Lord Chancellor.

*Oliver Anderson.*

Settled and approved by me this 7th of June 1838,

T. ERSKINE, C. J.

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Mr. *Swanston* and Mr. *Anderdon*, in support of the appeal.

If this property had been situate in England, there can be no question but that the petitioner would have been entitled to an Order from the Court of Review declaring him an equitable mortgagee, and directing a sale of the property, towards satisfaction of the debt due to him from the bankrupts. But, as the property is situate in Scotland, and the laws of that country are said to recognize neither liens, nor equitable mortgages, with respect to real property, the question resolves itself into this, namely,—whether, as all the parties to the transaction resided in England, and as the property itself, although situate in Scotland, must be administered in England under an English fiat of bankruptcy, the *lex loci contractus* ought not to prevail over the *lex loci rei sitæ*. That the assignees of a bankrupt can acquire no higher title in the bankrupt's property, than what the bankrupt himself possessed, is an axiom consonant to every principle in equity, as well as bankruptcy. They only take it, subject to all the equities by which the bankrupt was bound, that is, all the contracts by which he was morally bound in a legal sense; subject therefore to every contract not *malum in se*, nor against law or equity. The equitable mortgage of the petitioner being free from any objection of this nature, the assignees in this case must take the property charged with such equitable lien. If bankruptcy had not intervened, can there be any doubt that the petitioner would by bill in equity have had a right to compel the Messrs. *Courtney* to execute a legal mortgage? The contract, and the contractor, being equally within the jurisdiction of this Court, we contend, that wherever the subject of the contract might be situ-

ated, and whatever local law might attach upon it, this Court would, *agens in personam*, either compel a specific performance of the contract, or at least give effect to it by something equivalent. The assignees in this case cannot be considered as mere alienees of the bankrupts' property, but represent the bankrupts in all respects; and this being a contract operating on the conscience of the party, they were as much bound by it as the bankrupts themselves would be. The case of *Mitford v. Mitford* (a) establishes the position, that the assignment in bankruptcy passes the rights of the bankrupt precisely in the same plight and condition as the bankrupt himself possessed them, and subject to all the equities by which he was bound. In *Saunders v. Leslie* (b) also it was held by Lord *Manners*, that the assignees of a bankrupt cannot be in a better situation than the bankrupt himself, and that they are, in respect to his estate, liable to all the equities that would attach upon it in his possession. The same doctrine was held in *Chapman v. Tanner* (c) and in *Grant v. Mills* (d), and there are many other cases also to the same effect.

But the law of Scotland, it is said on the other side, does not recognize any such title as that of an equitable mortgagee, and therefore they contend that the property in this case cannot be affected with any equity of that nature. We submit, however, that there is nothing in that argument; for the property comes to the assignees charged in conscience and equity with an obligation, which the Court would have enforced against the *Pollards*, if they had not become bankrupt. Admitting that this Court has no authority to bind the Courts in Scot-

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(a) 9 Ves. 100.

(b) 2 Ball &amp; B. 515.

(c) 1 Vern. 267.

(d) 2 V. &amp; B. 309.

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land, yet it has full authority to act against the parties personally, and, without affecting the land, *per se*, can prevent any party within its jurisdiction from dealing with property abroad otherwise than according to justice and conscience. Upon this principle, an injunction was granted, in *Bushby v. Munday (a)*, to restrain a party from proceeding in the Court of Session in Scotland to enforce payment of a bond out of estates in that country, where a suit was pending in this country for the purpose of having the bond delivered up to be cancelled. We do not, however, seek to contravene the law of Scotland. What we ask is not prohibited by the Scotch law; for there is no law in that country, which declares that the owner of real property shall not pledge it for value. All that can be said is, that the law there is silent on the subject, and has provided no particular remedy for an equitable mortgagee. It is very probable, that the Courts there would hold this contract void as against a subsequent purchaser; but it would be contrary to every principle of justice, if it could not be enforced against the contracting parties, or their representatives who are bound by the same equities as the parties themselves. Until the 6 Geo. 4. c. 16. s. 64. the landed property of a bankrupt in Scotland did not pass to the assignees under an English commission; yet the Scotch Courts held, that a legal obligation was imposed on the bankrupt to execute the proper conveyances, and do the necessary acts, for transferring the property to his assignees. The Courts of Common Law in this country do not recognize an equitable mortgage any more than the Courts in Scotland, but the party finds a remedy for the deficiency of the Common Law, by resorting to the Courts of

(a) 5 Mad. 297.



Equity. Again, the English law is hostile to the right of a married woman to hold property independently of her husband; yet, in bankruptcy, it is the constant practice to give effect to the claim of the wife to have a suitable provision made for her, in proportion to the amount of the property which she brought her husband. We ask no more in this case,—not the property itself, but something from the assignees in the shape of an equivalent. Before the recent statute, if a tenant in tail contracted to bind the entail, a Court of Equity could not, as against the heir in tail, decree specific performance of the contract, so as to affect the land itself; but, acting against the person, the Court would imprison the party, as long as he refused obedience to the order of the Court enjoining him to do what in justice and equity he was bound to perform. There being nothing, then, prohibitory in the law of Scotland against pledging land by way of equitable mortgage, we submit, that the *lex loci contractus*, and not the *lex loci rei sitæ*, ought in this instance to prevail.

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Mr. J. Russell, and Mr. Bethell, *contrà*. The Court of Review has found, that no lien or equitable mortgage on land is recognized by the law of Scotland, and that finding, we contend, is correct. If so, then, how can this estate in the hands of the assignees be charged with any lien of the petitioner, under the agreement of the 13th March 1832? It is said, that an equitable right is created, binding on the conscience of the assignees, and that they being within the jurisdiction, the Court, acting *in personam*, can compel them to fulfil the contract of the bankrupts. But the contracting party, whose con-

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science is affected, the bankrupt, is not before the Court; and if he were, bankruptcy having intervened, the remedy *in personam* is gone. All rights against the person of the bankrupt are ended, and the assignees take his property only subject to the equities affecting the property, not to any equity binding on the conscience of the bankrupt. The question is not, therefore, how far the bankrupt was bound, but how far the estate was affected. Now the estate in this case must be governed only by the *lex loci rei sitæ*, which invariably applies to every question of real property (*a*). The law of Scotland treats an equitable mortgagee as a perfect stranger; it recognizes no such title to heritable property in that country; and therefore the freehold property of the bankrupts can be affected with no claim of this description. It is said, however, that the claim would have been enforced by the Courts in Scotland, if bankruptcy had not intervened; but no authority is cited for this position; and the contrary would seem to be the case, according to a passage in *Erskine's Institutes* (*b*), where it is said that if a contract relating to property in Scotland is created in England, there is no jurisdiction in the Scotch Courts to order a more formal conveyance; since an equitable mortgagee, being a person unknown to the Scotch law, could have no *locus standi in Curia*. And until that law is altered by act of parliament, as it was in the case of future debts, it is impossible to contend that a mere deposit of deeds can constitute a charge upon a Scotch estate. Before the 33 Geo. 3, c. 74, all dispositions of real property in Scotland to secure the payment of future debts were absolutely void; but by the 12th section of

(*a*) Burge, Col. Law, 843, 863.

(*b*) Page 442.

that act, the law is altered in this respect, and such securities were from thenceforth declared to be valid.

To recur to the argument of the other side, that this Court, acting *in personam*, can exercise jurisdiction over property wherever situate, and that the estate can be charged through the conscience of the assignees, who, it is contended, can only take according to the equities affecting the bankrupt,—now, in what sense is that expression used? Not, as to those equities which merely affect the bankrupt personally, but those only which specifically affect the property passing by the assignment. The claim set up by the petitioner in this case is, in effect, not to a proceeding on the contract, not an action *in personam*, but a proceeding *in rem*; and this brings the question back to the old position, namely, that the *lex loci rei sitæ* recognizes no lien on that estate by the mere deposit of title deeds. *De la Vega v. Viana* (a), and other cases cited in the argument in the Court below, only illustrate the position, that a party, coming to an English Court to enforce a contract made in a foreign country, must take the law in this country as he finds it.

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Mr. *Swanston*, in reply. I do not deny, that real property is to be affected by the law of the country where it is situate. But I contend, that a contract may be enforced by the law of the country where it is executed, and where the whole estate and effects of the party to the contract is in a course of distribution. There is a material distinction lost sight of in the argument for the respondents; namely, that the law regarding *contract* is regulated by the *locus contractus*, while that regarding

(a) 1 B. & Ad. 284.

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land depends upon the *locus rei sitæ*. The Court can deal with the subject, not as land, but as contract; and can work out the equities of the contract by its order upon the assignees, with respect to the disposition of the property come to their hands, among which are to be reckoned the proceeds from the sale of the property in Scotland. The cases already cited show, that a contract to this effect may be good, although it can give no lien on the land. A contract for an equitable mortgage will not charge the legal estate in England any more than in Scotland, except by the very means we here seek to adopt, that is, through the conscience of the party bound by the contract. It has been said, that we are, by the form of the prayer of the petition, proceeding against the estate, and not against the person. But if the Court were to accede to this argument, it would be regarding the form, and not the substance, of the petition, and would act contrary to the principles which ought to govern a Court of Equity. There is no suggestion, that there is any prohibition here by the law of Scotland against the enforcement of this contract; nor is there any direct conflict between the laws of the two countries. The only question is, whether the title of the assignees can be distinguished from the title of the bankrupt. We do not seek to establish a legal title to the estate in Scotland; all that we claim here is, the execution of the contract; and how can that be prevented by circumstances of exterior locality?

*Cur. adv. vult.*

January 20  
1840.

LORD COTTENHAM, C.—The short result of the facts of this case, as stated in the special case, (by which I am bound,) is, that the bankrupts were absolutely entitled,

as part of their partnership property, to some land in Scotland, the legal title being in *George Courtney*, one of the bankrupts; that the firm, being indebted to the petitioner *George Pollard*, in order to induce him to give them further credit, deposited with him the disposition and instrument of seisin, being the title deeds of such land, and signed and gave to him a memorandum in writing, dated the 13th of March 1832, declaring that they thereby gave to *Pollard* a lien upon the land for the general balance of all or any monies that then were, or might thereafter become, due to him from them to the extent of 2,000*l.*; and they agreed that he should stand in the nature of an equitable mortgagee thereof; and, on demand, they further agreed to make, do, and perfect all such acts for the better securing to him of any such monies as aforesaid: that *Pollard*, relying upon the security of the hereditaments so charged to him as aforesaid, continued to give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th December 1832, at which time he was a creditor for the sum of 1927*l.* 4*s.* 6*d.* The only other fact stated in the special case, material to the present question, is, that by the law of Scotland no lien, or equitable mortgage, on the estate in question was created by the deposit of the title deeds, or by the written memorandum. The question is, whether *Pollard* is, under these circumstances, entitled to have his debt paid out of that part of the estate of the bankrupts, which consists of their property in Scotland, in preference to their general creditors; or, in other words, the assignees being liable to all the equities to which the bankrupt was subject, whether such a deposit and agreement, made and entered into in this country,

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gave to the creditor such a right as against his debtor, as will entitle him to have the agreement performed, and the debt paid out of the property in Scotland, the subject of such deposit and agreement. By the statement in the special case of the law of Scotland, which, sitting here, I must consider as a fact, I am bound, but so far only as the statement goes; and that does not find anything contrary to the well-known rule, that obligations to convey, perfected *secundum legem domicilii*, are binding in Scotland; but that, by the law of Scotland, no lien or equitable mortgage was created by the deposit and agreement; by which must be understood, that the law of Scotland does not permit such deposit and agreement to operate *in rem*, and not that they may not give a title to relief *in personam*. It is true, that in this country contracts for sale, or (whether express or implied) for charging lands, are in certain cases made by the Courts of Equity to operate *in rem*; but, in contracts respecting lands in countries not within the jurisdiction of these Courts, they can only be enforced by proceedings *in personam*, which Courts of Equity here are constantly in the habit of doing; not thereby in any respect interfering with the *lex loci rei sitæ*. If, indeed, the law of the country where the land is situate should not permit, or not enable, the defendant to do what the Court here might think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of

such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities.

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The observations of Lord *Hardwicke* in *Penn v. Baltimore* (a) are founded upon this distinction. In Lord *Cranstoun v. Johnson* (b), Lord *Alvanley*, upon principles of equity familiar in this country, set aside a sale in the Island of St. Christopher, by the laws of which country the sale was perfectly good, no such principles of equity being recognized by the Courts there, saying, "With regard to any contract made, or equity, between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction, as if they were situated in England." In *Scott v. Nesbitt* (c) Lord *Eldon*,—in the face of the Master's report, finding that there was no law or usage in Jamaica for a lien by a consignee, in respect of supplies furnished to the estate,—directed consignees to be allowed such expenditure in their account with incumbrancers. Bills for specific performance of contracts for the sale of lands, or respecting mortgages of estates, in the colonies, and elsewhere out of the jurisdiction of this Court, are of familiar occurrence. Why then, consistently with these principles and these authorities, should the fact, that by the law of Scotland no lien or equitable mortgage was created by the deposit and memorandum in this case, prevent the Courts of this country from giving such effect to the transactions between the parties, as it would have given if the land had been in England? If the contract had been to sell the lands, a specific performance would have been decreed; and why

(a) 1 Ves. 454.

(b) 3 Ves. 182.

(c) 14 Ves. 442.

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is all relief to be refused, because the contract is to sell, subject to a condition of redemption? The substance of the agreement is, to charge the debt upon the estate, and to do and perfect all such acts as may be necessary for the purpose; and if the Court would decree specific performance of this contract, and the completion of the security according to the forms of law in Scotland, it will equally give effect to this equity, by ordering the assignees to pay out of the proceeds of the estate (which being part of the bankrupt's estate must be sold) what is found to be the amount of the debt so agreed to be charged upon it; which is what the creditor asks. The special case finds, that the deeds were deposited and the agreement signed by the bankrupts, in order to induce the creditor to give them further credit; and that he, relying upon the security of the hereditaments so charged to him, continued to give credit to the bankrupts to the time of their bankruptcy. The transaction is in no respect impeached; and there is no competition with any person having obtained a title under the law of Scotland. The only parties resisting the creditor's claim are the assignees, who are bound by all the equities which affected the bankrupts. To deny to the creditor the benefit of this security, would be an injustice, which, if unavoidable, would be much to be regretted. In giving effect to it, I act upon the well-known rules of equity in this country, and do not violate, or interfere with, any law or rule of property in Scotland; as I only order that to be done, which the parties may by that law lawfully perform.

I reverse the judgment of the Court of Review, and give to the creditor payment of his debt out of the proceeds of the estate.

Judgment reversed.

Mr. *Russell* now applied for leave to appeal from his Lordship's decision to the House of Lords, under the 1 & 2 Will. 4. c. 56. s. 37., which provides that in case the Lord Chancellor shall deem any matter of law or equity, brought before him by way of appeal from the Court of Review, to be of sufficient difficulty or importance to require the decision of the House of Lords, the Lord Chancellor may direct the whole facts whereupon such question of law or equity shall arise, to be stated in the form of a petition of appeal to the House of Lords, and the party appealing may carry such appeal to the House of Lords in like manner as other appeals are preferred to that House.

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 POLLARD.
 February 14.

Mr. *Anderdon* opposed the application; but if his Lordship should think proper to grant it, he submitted, that the special case ought to be re-stated, as it was in some respects erroneous.

The LORD CHANCELLOR said, that the act of parliament had placed him in a very embarrassing position, to leave it to his discretion to grant an appeal, or not, against his own judgment. He thought, however, that he ought not to refuse the appeal. With respect to any alteration of the special case, as he was himself concluded by it as it came from the Court of Review, it must go in the same shape to the House of Lords (a).

(a) The 1 & 2 Will. 4, c. 56, s. 37, provides " that the case to be lodged by the parties in the House of Lords shall be confined in matter of fact, in cases of appeal from the Lord Chancellor, to setting forth the special case brought up to the Lord Chancellor from the Court of Review; and in cases of appeal from the said Court of Review, to setting forth a special case, to be affirmed and certified in manner hereinbefore provided touching appeals to the Lord Chancellor, and to such arguments on the point of law, as the parties may be advised to state."

1839.

*Westminster,
January 10.*

Though the Court will not permit a party, against whom a fiat issues, to oppose the adjudication by counsel, yet, on a strong case made out by him, they will order the advertisement to be stayed, and give him leave to apply instantly to annul.

Ex parte FOULKES.—In the matter of FOULKES.

THIS was a petition by the party against whom a fiat had been taken out, stating, that he had not committed an act of bankruptcy; that there was not a sufficient petitioning creditor's debt; and that he was not a trader; that he was able to pay all his creditors in full; and that the fiat was issued, not for the purpose of prosecuting it for the benefit of the general creditors, but to compel the petitioner to comply with some arrangement proposed by the petitioning creditor, who was his attorney.

The petition stated, that if the petitioner should be adjudged a bankrupt, great loss and injury would be occasioned to him in his fortune and reputation; and that if he should be permitted to oppose the proof that would be attempted to be made by the petitioning creditor, the petitioner believed that the Commissioners would not adjudge him to be a bankrupt.

The prayer was, that the fiat might not be opened, without notice to the petitioner, and that he might be at liberty to attend the opening by his counsel, and oppose the evidence which might be adduced against him.

The Court said, that they could make no order for the attendance of counsel; but that if the bankruptcy was found by the Commissioners, the advertisement might be stayed, and the petitioners be at liberty to apply immediately to annul the fiat, and stay all further proceedings, and that the petitioner might be at liberty to amend his petition for that purpose.

1839.



Ex parte BOUSFIELD.

Westminster,
January 12.

THIS was an application made on behalf of Mr. *Bousfield*, who had lately been one of the deputy registrars of the Court of Bankruptcy. His salary was payable quarterly, and had been received by him up to the 11th April 1838. On the 19th of May following he resigned his office, and subsequently took the benefit of the Insolvent Debtors' Act. By the 1 & 2 Will. 4. c. 56. s. 50., under which the appointment to the office had been made, it is enacted, "that if any person for the time being holding the said office should resign the same, he should be entitled to receive such proportionable part of his salary, as should have accrued during the time that such person should have executed his office since the last payment. Mr. *Bousfield* had executed the duties of the office until he resigned, when the sum of 62*l.* 8*s.* 5*d.* had accrued due to him between the 11th of April and the 19th of May 1838. He had applied to the accountant in bankruptcy for payment of this sum, who declined to pay the money, on the ground that it belonged to the assignee under the insolvency.

One of the deputy registrars having resigned his office, and taken the benefit of the Insolvent Act, applied to the Court to order the accountant in bankruptcy to pay him the balance of salary due to him, the assignee under the insolvency having refused to receive it;—the Court declined making any order; but the Lord Chancellor afterwards granted the application.

Mr. *Twiss* now applied for a declaration from this Court, that Mr. *Bousfield* was entitled to the money, stating, that he was furnished with an affidavit that the assignees under the insolvency had refused to receive it; and he therefore prayed an Order that the accountant might be directed to pay it over to Mr. *Bousfield*.

Sir JOHN CROSS.—This Court cannot interfere. If there had been any dispute between two officers of the

1839.

Ex parte
BOUSFIELD.

Court, the matter might then have very properly been brought before it ; but that is not the present case.

Note.—On a subsequent application to the Lord Chancellor, his Lordship made the Order as prayed.



Westminster,
January 22.

Where parties agree upon an Order out of Court, any question of costs between them cannot be decided, without opening the whole case.

On a petition for the sale of an equitable mortgage, which is rendered necessary by the assignees, from a mistaken view of their rights, they are only entitled to costs out of the bankrupt's general estate.

Ex parte BATE.—In the matter of GOUGH.

THIS was the usual petition for the sale of an equitable mortgage.

Mr. *Swanston*, who appeared for the petitioner, stated, that the petitioner and the respondents had agreed out of Court upon the Order to be taken upon this petition, except as to the mode and amount in which the costs were to be paid, which the agreement left for the decision of the Court.

Mr. *Anderdon*, on behalf of the assignees, proposed that the costs of all parties, as between solicitor and client, should come out of the produce of the sale of the mortgaged property.

Mr. *Swanston* objected to this, on the ground that the petition would have been unnecessary, but for the conduct of the assignees.

The COURT said, that it was quite impossible they could decide the question of costs, unless they heard the merits of the petition, and the whole case was opened before them. If, however, the petition was rendered necessary

by the conduct of the assignees, arising from a mistaken view of their rights, it was clear they could claim nothing beyond costs out of the bankrupt's general estate.

1839.

Ex parte
BATE.

In the matter of HAINES.

MR. SWANSTON applied to have this fiat directed to Birmingham, instead of Sheffield, or Daventry. It appeared, that the bankrupt carried on business at Kilsby, in Northamptonshire, and at Clay Cross in Derbyshire, and that Birmingham was about half-way between those places, Kilsby being distant about thirty-two miles, and Clay Cross about forty-five miles from Birmingham. The nearest place to Kilsby, where there was a list of commissioners, was Daventry, which was twenty miles off; and the nearest list to Clay Cross was at Sheffield, which was the same distance from that place. The majority in value of creditors resided at Birmingham, and the majority in number also resided nearer to Birmingham, than either to Kilsby or Clay Cross.

January 25.

What justifies a change of venue, as to the direction of the fiat.

Sir JOHN CROSS.—We are very reluctant to depart from the general rule. But the peculiar circumstances of this case appear to justify the application; it being shown, that Birmingham is central between the two places where the bankrupt carried on his business, and nearer likewise to the residence of the major part in number and value of the creditors. This case therefore is free from the objection, which usually prevails against applications of this description.

1839.

January 25.

Ex parte JOSEPH HAMMOND, and RICHARD HODGSON SMITH.—In the matter of THOMAS WHITHALL JACKSON and THOMAS WILLIAMS.

Where an order for the taxation of a solicitor's bill is not obtained until after his death, his administratrix is not liable to the costs of taxation, although more than a sixth is taken off; nor are such costs the subject of set off.

THIS petition came before the Court on further directions, after an order to tax the solicitor's bill up to, and subsequently to, the choice of assignees, and after the Registrar had made his certificate of such taxation. The petition stated the following facts:

The fiat was issued in September 1836, and the petitioner *Richard Hodgson Smith*, and *Samuel Hodgson Smith*, were the petitioning creditors. *Richard Hodgson Smith* proved a debt of 100*l.* and upwards, being chosen one of the assignees; but the petitioner, *Joseph Hammond*, was not a creditor, and became an assignee only at the request of the creditors. The petitioning creditors employed one *John Phillips*, since deceased, as their solicitor, in suing out the fiat; and *Phillips* made out a bill of costs up to the choice of assignees, which had been taxed by the commissioners at the sum of 52*l.* 19*s.* 1*d.*, and afterwards duly filed with the proceedings. By an order of the commissioners under their hands, dated the 28th September, 1836, they directed the amount so taxed to be paid; and the petitioners subsequently paid the same accordingly. But it was alleged in the petition, that the bill so taxed and paid contained various improper charges, some of which were set forth.

Phillips, the solicitor, died in January 1837, and letters of administration of his estate and effects⁴ were granted to *Jane Jackson*, wife of *Samuel Jackson*.

A bill of costs of *Phillips*, for business done by him

subsequently to the choice of assignees, was made out by the administratrix, and was taxed by the commissioners at 23*l*. 2*s*. 6*d*., which it was also alleged contained various improper charges.

Samuel Jackson and his wife, as administratrix, commenced an action against the petitioners, to recover the amount of the bill of costs subsequently to the choice of assignees, the amount of the plaintiffs' claim (as indorsed on the writ issued) being 28*l*. 7*s*. 1*d*.; but, in the particulars of the plaintiff's demand, they claimed the sum of 71*l*. 7*s*. 1*d*.

The petitioners alleged, that they believed that the plaintiffs sought to recover in the action, not only the last-mentioned bill for 23*l*. 2*s*. 6*d*., but also another and third bill of costs, amounting to 30*l*. 15*s*. 9*d*., or thereabouts, which had not been taxed. The petitioners having taken out a summons, calling on the plaintiffs to show cause why the three bills of costs should not be referred to the Master of the Court of Exchequer for taxation, the Court made an Order referring the third bill, but adjourned the further hearing of the summons, to enable the petitioners to apply to this Court for taxation of the other two.

The petition to this Court accordingly prayed a reference to tax the bills up to the choice of assignees, and subsequently thereto; and if it appeared that *Phillips* had been overpaid, then that the amount might be refunded out of the estate of *Phillips*, or deducted from what might be found due to *Samuel Jackson* and his wife, as such administratrix, on taxation of the bill subsequent to the choice of assignees. The bills were taxed accordingly, and more than a sixth taken off; and the question now was, as to the costs of taxation.

1839.

Ex parte
HAMMOND
and another.

1839.

Ex parte
HAMMOND
and another.

Mr. *West*, for the assignees. The practice at common law is, that if an action be brought on a bill of costs, and it is afterwards ordered to be taxed, and reduced on taxation by more than one-sixth, neither party receives the costs of taxation. The assignees, it is admitted, must pay the costs of the action; but the costs of taxation of the second bill, for which the action was brought, would not be allowed to the plaintiffs. The first bill, also, had nothing to do with the action, and the plaintiffs refused to allow it to be taxed under the judge's order, by which proceeding the expense of this petition would have been avoided. Under this state of circumstances, it is submitted that the plaintiffs should pay the costs of this petition, and of the taxation of the first bill, and of the present application, and that such costs ought to be set off by the assignees against the balance due to the plaintiffs, and the costs of the action.

Mr. *Swanston*, *contra*. The solicitor in this case being dead, and the plaintiffs suing as his personal representatives, they are not chargeable with the costs of taxation, although more than a sixth has been taken off. In *Weston v. Pool* (a), it was decided, that the executor of an attorney pays no costs under these circumstances. And the same doctrine was held in the more recent case of *Re Cole* (b).

Mr. *West*, in reply. Admitting the authority of the cases cited, this Court is vested by the statute with a discretion as to costs, and the present application may be granted by the Court, in the exercise of its general jurisdiction.

(a) 2 Stra. 1056.

(b) 2 Sim. & S. 463.

The COURT said, there was no ground for the present application, and that no set-off could be allowed, except upon the principle of ordering payment of the costs of taxation by the administratrix; which the cases cited showed could not be done. If the application to tax the bills had been made in the lifetime of the solicitor, he might have known that more than a sixth would be taken off on taxation, and might have been therefore deterred from submitting it to such an ordeal; but his administratrix could have known nothing, as to the probable result of such an investigation. There can be no order therefore as to the claim of set-off.

1839.

Ex parte
HAMMOND
and another.

Ex parte CHARLES MEEKING.—In the matter of
ROBERT BRAY.

THIS was an application that a fiat might be directed to the Court of Bankruptcy, and be prosecuted in London, instead of being directed to commissioners at Cheltenham, the place of the bankrupt's residence. The petition stated, that the act of bankruptcy, upon which the docket was struck, was a fraudulent conveyance executed by the bankrupt, and that the petitioner believed that such conveyance was concerted with the intent to defraud his creditors, but more especially those who lived at a distance from his place of business; and that the petitioner believed that fraud towards such creditors would be attempted to be practised, and be more easily perpetrated, if the working or prosecution of the fiat were to be in the neighbourhood of the bankrupt's residence, and not in London, where the petitioner believed

Jan. 25.

A London fiat will not be granted in preference to a country one, merely because the act of bankruptcy is a fraudulent conveyance, and the petitioning creditor believes that fraud will be attempted to be practised in the country against the distant creditors.

1839.

Ex parte
MEEKING.

greater facilities for the attainment of justice would be afforded.

Mr. *Keene* appeared in support of the petition.

Sir JOHN CROSS.—I see no pretence for departing in this case from the regular course. The reason assigned for prosecuting the fiat in London would equally apply to every other case, where there was any suspicion of fraud. It appears to me that there will be equal, if not greater, facility in detecting fraud, by prosecuting the fiat where the bankrupt resides, than by working it a distance from the spot where the fraudulent transactions are alleged to have taken place.



Ex parte HARVEY.—In the matter of EMEY and
RAVENS-CROFT.

Westminster,
Jan. 29.

Where there was a deposit of deeds, with an agreement to execute a legal mortgage, which was not executed until after the party had committed an act of bankruptcy: Held, that though the legal mortgage was avoided by the bankruptcy, the equitable mortgage was revived, and not merged in the legal mortgage.

THIS was the petition of an equitable mortgagee of the bankrupt *Emery*, who deposited with the petitioner the title-deeds of an estate, accompanied by a memorandum dated the 19th February 1835, to secure advances by the petitioner to *Emery*, with an undertaking to execute a legal mortgage, when required. In January 1837, *Emery* executed a legal mortgage in pursuance of this agreement, having previously, in August 1836, committed an act of bankruptcy; upon which, however a fiat did not issue till 21st February 1837.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. If the legal mortgage is considered to be in-

validated by the act of bankruptcy, of which the petitioner had no notice, he has nevertheless a right to resort to his original equitable mortgage, which took place long before the alleged act of bankruptcy.

1839.

 Ex parte
 HARVEY.

Mr. Campbell, contra. The right of the petitioner, as equitable mortgagee, is gone, the legal mortgage having merged the equitable mortgage.

Sir JOHN CROSS.—But the legal mortgage, you contend, is void by the previous act of bankruptcy.

Mr. Campbell. Not void, but only voidable, by the subsequent issuing of the fiat. The legal mortgage was good at the time it was executed, and would have continued so, unless a fiat had issued.

Sir J. CROSS.—But you now come here to avoid the legal mortgage.

Sir G. ROSE.—The effect of the legal mortgage only suspended the operation of the equitable mortgage.

The COURT finally determined that the equitable mortgage was, under these circumstances, revived by the subsequent bankruptcy, under which the assignees had claimed to avoid the legal mortgage; and made the

Usual Order.

1839.

Westminster,
Jan. 29.

Where, after proof of a debt, a surety pays part of it to the creditor, but not in discharge of the whole debt, the creditor may receive dividends on the full amount of his proof.

Ex parte COPLESTONE.—In the matter of SNELL.

THIS was the petition of a creditor for the payment of a dividend on the amount of a debt of 520*l.*, which he had proved under the fiat. It appeared, that subsequent to the proof, and before the declaration of the dividend, a surety had paid the creditor 300*l.* in part discharge of the debt.

Mr. *Terrell* appeared in support of the petition.

Mr. *Teed, contra*. The petitioner, under these circumstances, is only entitled to receive the dividend on the balance of his debt, after deducting the 300*l.* By the 6 *Geo.* 4. c. 16. s. 52, the surety has a right to stand in the place of the creditor, whether he pays the whole debt, or only part of the debt.

Sir JOHN CROSS.—Putting the matter on the broad ground of equity, I think the payment made by the surety must be considered, as without prejudice to the right of the creditor to recover the whole amount of his debt. But the proof having been made before the receipt of the money from the surety, it does not appear to me, that the creditor, by thus receiving a portion of his debt, surrendered his right to receive dividends on the amount of his proof, provided he did not receive in the whole more than 20*s.* in the pound.

Sir GEORGE ROSE.—It seems very reasonable, that the creditor, under these circumstances, should be entitled to dividends on his whole proof. The assignees have

no *locus standi*, either on legal, or equitable principles. There was no payment here of the entirety, nor any partial payment in discharge of the entirety. And by the terms of the statute, the surety is only entitled to stand in the place of the creditor, when he pays the debt, or any part thereof, in discharge of the whole debt. There is no pretence for withholding the dividends.

1839.
Ex parte
COPESTONE.

Order made, but without costs.

Ex parte BAKER.—In the matter of SCOTT.

THIS was the petition of a creditor to prove a debt. When it was called on, no counsel appearing for the assignees,

Mr. *T. Parker*, in support of the petition, urged, that he was consequently entitled to the Order as prayed, on the ground that the solicitor for the assignees had, on application made to him, undertaken to accept service of the petition on their behalf, and that the petition was accordingly served upon him.

The COURT thought the service not sufficient; and that the petition should have been served on the assignees personally, to have entitled the petitioner to take an Order in their absence.

Mr. *Dixon*, appearing afterwards as counsel for the assignees, objected that the petition did not show the grounds on which the Commissioner had rejected the

Westminster,
April 23.
On a petition to prove, if the assignees do not appear, the order cannot be taken, unless there is an affidavit that they were personally served with the petition; service on their solicitor, who had undertaken to accept it, is not enough. *Semble*, that the petition must state the grounds, on which the proof was rejected by the Commissioners.

1839.

Ex parte
BAKER.

proof. In *Ex parte Worth* (a), this was held to be an essential allegation in the petition.

The COURT seemed to admit the validity of this objection, and ordered the petition to stand over.

(a) 2 Deac. & C. 4.

Westminster,
April 26.

A London fiat was refused against a country trader, although not a seventh part in value of the creditors resided where he carried on his business, and all the witnesses to prove the requisites lived in London, and the object of the fiat was to defeat an alleged fraudulent cognovit.

Ex parte WAINWRIGHT.—In the matter of MANSFIELD.

MR. BICHER applied for a London fiat against a bankrupt who resided at Shepton Mallett, on the following grounds:—The object of the fiat was to set aside a cognovit given by the bankrupt to a particular creditor, and which was alleged to be a fraudulent preference. The petitioners were the only creditors whose debt was large enough to constitute a good petitioning creditors' debt, and the witnesses to prove all the requisites resided in London. There were only ten creditors in all, and the whole amount of the debts was not more than 350*l.*, and of this sum, creditors only to the amount of 45*l.* resided at Shepton Mallet.

Sir JOHN CROSS.—The material question seems to be, as to the alleged fraudulent cognovit. Now the witnesses to prove the invalidity of this document reside for the most part at Shepton Mallet, where it would be therefore more desirable that the investigation should take place.

Sir GEORGE ROSE concurred.

Application refused.

1839.

Westminster,
April 27.

In the matter of GEACH.

THIS was a similar application to change the venue of the fiat from Pontypool to Bristol, on the ground that two of the Commissioners to whom it was intended to be directed were creditors of the bankrupt; two others resided at a considerable distance from Pontypool; and the fifth generally declined to attend; so that there were in fact but two who could by any probability, and that with some inconvenience, be procured to act. The debts amounted to 60,000*l.*, and only four of the creditors resided in the neighbourhood of Pontypool.

Under what circumstances the venue of the fiat will be changed.

Mr. *Rose* was in support of the application, which

The Court of Review having refused,

Mr. *Swanston* afterwards applied to the Lord Chancellor for an order.

May 1.

The LORD CHANCELLOR made the Order as prayed.

Ex parte the Rev. SAMUEL MARINDIN, and SAMUEL PETER MARINDIN.—In the matter of SAMUEL PETER MARINDIN.

Westminster,
May 4.

THIS was a petition for a supersedeas, under the composition contract clauses of 6 *Geo.* 4. c. 16. s. 133, 134, of a commission issued so far back as June 1827. It appeared that in July 1828 the bankrupt offered his creditors a composition of 10*s.* in the pound; and on the

The Court declined to act on a certificate of Commissioners made eleven years ago, without first sending it back to them for review.

1839.
~
Ex parte
MARINDIN
and another.

9th August following, the Commissioners certified that the bankrupt had duly conformed, and passed his last examination; that at a meeting duly convened on the 12th July 1828, the petitioner *Samuel Marindin* offered to pay the creditors the proposed composition, together with the costs of all parties in effecting the composition and supersedeas, on condition that the assignees should, in the event of the creditors at the second meeting agreeing to accept the same, and previous to superseding the commission, convey to the petitioner *Samuel Marindin* all the estate of the bankrupt, and doing other acts necessary towards the supersedeas and such conveyance; and that at the second meeting duly held and convened, all the creditors attending agreed to accept the composition. The petition stated, that the assignees had not conveyed the estate to the petitioner *Samuel Marindin*, he not considering such a formality requisite, in the event of the commission being superseded.

Mr. *Koe* appeared in support of the petition.

Mr. *Flather* consented, on behalf of the assignees.

The COURT said, that as this was so old a commission, it would not be right to make the Order, without first referring it back to the Commissioners to review their certificate.

July 17. The Commissioners having confirmed their former certificate, the Court on this day made the Order as prayed.

1839.

Ex parte JAMES GOODBODY and others.—In the matter
of ANNA CLEMPSON FREEMAN.

Westminster,
May 7 and 8.

THIS was a petition complaining of the conduct of the assignees, and praying for their removal, on the ground of their mismanagement of property which had been mortgaged by the bankrupt; the petition also prayed for a resale of the property. The petition alleged, that no *bonâ fide* sale had taken place, but that a Mr. *Randall* had been employed to bid by the assignees and their solicitor, and was declared the purchaser; that he had found himself duped by the assignees; and that he and his attorney, and the clerk of the latter, knew all the circumstances of the pretended sale, which they had, in fact, admitted to the petitioners and their solicitor, and had offered to make affidavit of them; but that Mr. *Randall's* attorney having since become the attorney of the bankrupt, he and his clerk now refused to give any evidence in support of the petition.

A *vivâ voce* examination will not be granted, merely because some parties have previously stated facts, which they afterwards refuse to depose to on affidavit.

Mr. *Wood*, in support of the petition, urged that these circumstances rendered it essential that there should be a *vivâ voce* examination.

Sir JOHN CROSS was inclined to grant a *vivâ voce* examination, as it was very doubtful how far the information received from a third party could, under these circumstances, be treated as evidence against the assignees.

Sir GEORGE ROSE.—In a case where both parties agree to a *vivâ voce* examination, the Court directs subpoenas to issue, as of course; but where only one side is

1839.

Ex parte
GOODBODY
and others.

desirous of that mode of proceeding, then the practice is, first to hear the case on the affidavits, and if the Court is not satisfied with them, to direct a *viva voce* examination. But there is no difficulty, as to the mode of proceeding in this case. The petitioner, or any other party, can depose to facts, according to their information and belief, stating that the party, who gave the information, refuses to give evidence before the Court; and that refusal will let in the affidavit as to information and belief, which will be decisive against the other side, unless the information or the facts are specifically contradicted. There is therefore no necessity, at present, for ordering a *viva voce* examination.

Ex parte ROBERT MAY and others.—In the matter of
HENRY JONES.

Westminster,
May 7.

Assignees, in instituting a suit in equity, proceed at the peril of costs, and the Court will not stay it, on the petition of creditors objecting to its being continued; but will refer it to the Commissioners, to inquire how much of the assets ought to be retained by the assignees, to abide the result of the suit.

THIS was a petition of the major part in number and value of the creditors who had proved debts under the fiat, praying that the assignees might be restrained from further prosecuting a suit in Chancery, and that the Court would direct an inquiry into the circumstances under which it was instituted, and whether the further prosecution of it would be beneficial to the bankrupts' estate, and whether also a pending action at law should be defended. The petition likewise prayed for the declaration of a dividend.

The fiat was issued on the 7th November 1837; and at a meeting of creditors on the 15th January 1838, authority was given by part of the creditors then present, for the institution of proceedings in equity respecting

some property, to which it was alleged the bankrupt was entitled. But the debts of all the creditors who had then proved amounted only to 279*l.*, while the amount of those then and since proved was 2898*l.*; most of the creditors having delayed their proofs till the first dividend meeting on the 11th January 1839.

The petition alleged, that the authority (if any were given to the assignees) to file a bill in equity was of a very general nature, and that the questions involved were of a difficult and extraordinary kind, and on which the creditors were wholly incapable of forming any judgment, without the advice of counsel, which they had not taken when the proceedings were resolved upon. That the bill was filed on the 11th December 1838, and the petitioners had since taken the opinion of counsel, which was unfavourable to the prospect of any benefit resulting to the creditors. That an action was brought against the assignees by the landlord of the bankrupt's premises, which they defended without consulting the wishes of the creditors; and that the petitioners, conceiving the steps taken by the assignees to be injudicious, requested the solicitor to the fiat to call a meeting of creditors upon the subject, by advertisement in the Gazette, which he at first agreed to do, but afterwards declined, on the part of the assignees. The petitioners, however, thereupon inserted an advertisement, calling a meeting of the creditors, and wrote to the solicitor, requesting the attendance of the assignees, and begging that they would be prepared to show the advice under which they were acting. The solicitor refused to pay any attention to this request; but, ultimately, one of the assignees attended the meeting, and though he did not sign, acquiesced in, the consequent resolution of the creditors pre-

1839.

Ex parte
MAY
and others.

1839.

Ex parte
MAY
and others.

sent against the continuance of the proceedings both in equity and at law. The petition further alleged, that the assignees had in their hands 460*l.* applicable to payment of a dividend, which they had refused to make, in consequence of the pendency of the suit ; and that the assignees, and their solicitor, refused to give the petitioners any information, as to the advice or opinion under which they acted.

It appeared from the affidavits in opposition, that the effect of the suit in Chancery would, if it succeeded, be to upset an arrangement which had been entered into between the bankrupt and his family, and that some of the petitioners were parties defendant in it, and were therefore much interested in the abandonment of the suit.

Mr. *Lovat*, and Mr. *Koe*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *Sharpe*, for the assignees. There is no authority for such an application as that made by these petitioners, four of whom are near relations of the bankrupt, two of them being his brother and sister, and two others his brother and sister in law ; so that the petition appears to have been got up under a sort of family compact. Two of the other petitioners are defendants in the suit in chancery, and carry on a business under the directions of a will, which bequeaths an interest and share in the property to the bankrupt's wife ; and it is their share and interest, which is claimed by the assignees in right of the wife, and is the subject of the suit in chancery. This suit was instituted with the sanction of all the creditors who had then proved

under the fiat ; and the assignees, in the performance of their duty, as trustees for the welfare of the general creditors of the bankrupt, are advised that they ought to continue the suit. The bankrupt has a contingent interest in the wife's share in the business, and one of the objects of the bill is to have the value of the bankrupt's interest ascertained, in order that it may be sold for the benefit of the creditors. The bill also complains of the executors under the will having invested great part of the trust property in real estates, which they had no right to do ; and it prays an account. The tenant for life is the widow of the testator, and the bankrupt's wife has an interest on her death, if she survives her. The consent of creditors is not an essential ingredient to the validity of a suit in equity instituted by assignees, and is only material, as to the question of costs. If they institute a suit improperly, they take the consequence of their own act, and the Court visits them with costs. They prosecute the suit therefore on their own responsibility, and at their own risk. In the present case, the assignees had the approbation of the creditors who had proved up to the time of the first meeting ; but were it otherwise, this Court would not interfere to stop their proceedings, bound as they are in their character of trustees, to scrutinize thoroughly the bankrupt's affairs. This is not like the case of assignees carrying on the bankrupt's trade, without the consent of creditors. But even there the consent of all the creditors is not necessary ; for the Court will direct a reference to inquire whether the business can be beneficially carried on, even against the dissent of some of the creditors. [Sir *John Cross*. Does not the petition in this case show sufficient grounds for ordering a dividend ?] Not if they are au-

1839.

Ex parte
MAY
and others.

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Ex parte
MAY
and others.

thorized to carry on the suit ; for they have a right to retain funds sufficient for that purpose. The only order, which the Court can make on this petition, is to direct an inquiry whether there is a reasonable chance of the assignees succeeding in the suit in equity, and whether the payment of a dividend ought to be stayed to enable them to proceed with the suit.

Mr. *Lovat*, in reply. It may probably turn out, that the interest of the bankrupt's wife under the will is for her *separate* use. If so, the success of the assignees in the suit would be very equivocal. But, at any rate, the petitioners are entitled to a reference, to inquire whether the continuance of the suit is likely to prove in any way beneficial to the creditors of the bankrupt.

Sir JOHN CROSS.—It appears to me, that the petitioners are quite justified in coming to this Court ; for it was natural they should think, after seeing the opinion of counsel, which they had taken on the subject, that the chancery suit was a precipitate proceeding ; and it was not unreasonable that they should wish the matter to be reconsidered. On the other hand, the assignees are equally justified in resisting their application, having obtained the sanction of the majority of the creditors who had proved when the suit was instituted. Since then, however, a large mass of creditors have come in, and think that the suit should be abandoned ; and it appears, that the petitioners showed the assignees, or their solicitor, the opinion on which they acted. It would have been more candid, therefore, if the assignees had not resisted the application made by the petitioners for a sight of the opinion of the counsel who advised the suit.

If the petitioners are inclined to take the inquiry at the hazard of costs, and the assignees do not object, I see no objection to a reference as to the prudence of continuing the suit.

1839.

Ex parte
MAY
and others.

Sir GEORGE ROSE.—If the assignees chuse to go on with the suit, at the peril of costs, this Court has no authority to stay the proceedings; for assignees are not to be dealt with as if they were bare trustees, but have a right to exercise a discretionary power. If the parties can agree to an inquiry whether there was *probabilis causa litigandi*, it may be referred to the Registrar to inquire whether the suit was properly instituted, and the costs to abide the event of the inquiry. But if not, there must be a reference to inquire how much of the estate ought to be retained by the assignees for the purpose of carrying on the suit.

The ORDER was, that it should be referred to the Commissioner, to inquire how much of the estate in the hands of the assignees ought to be reserved, to abide the result of the suit in chancery, to answer the costs of the assignees, without prejudice to any question as to costs improperly incurred by the assignees in prosecution of the suit; that the costs of both parties should be paid out of the estate; and that the Commissioner should proceed to declare a dividend.

1839.



Westminster,
May 22.

Ex parte JOSEPH ROSE.

A creditor, after filing an affidavit of debt to the amount of 100*l.* and upwards, under the 1 & 2 *Vict.* c. 10. s. 8., upon which a bond was taken by the Commissioner in 200*l.*, filed a second affidavit, stating the real amount of his debt, viz. 3612*l.* The Court declined making an Order for taking the second affidavit off the file.

THIS was an application to take an affidavit off the file, which had been made by a creditor under the act for the Abolition of Imprisonment for Debt, under the following circumstances. By that statute, 1 & 2 *Vict.* c. 110. s. 8., it is enacted, "that if any creditor of a trader, whose debt amounts to 100*l.* or upwards, shall file an affidavit in the Court of Bankruptcy, that such debt is justly due, and that the debtor is a trader, and shall cause him to be served personally with a copy of such affidavit, and with a notice in writing requiring immediate payment of such debt, then, if such trader shall not within twenty-one days after such service pay the debt, or secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, to pay such sum as shall be recovered in any action, with costs, or to render himself to the custody of the gaoler of the Court in which the action is brought, he shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit and notice, provided a fiat shall issue within two calendar months from the filing of such affidavit."

It appeared that on the 20th April, Mr. *Gibson*, the creditor, had filed an affidavit, alleging a debt to be due to Mr. *Gibson* and his partner to the amount of 100*l.* and upwards, on certain bills of exchange; and on the 22d April the petitioner, who lived at Manchester, was served with a copy of the affidavit, and notice of a demand for 3612*l.*, within the period required by the sta-

tute; upon which security was tendered, and a bond for 200*l.* approved of by Sir *C. F. Williams*, one of the Commissioners. On the 29th April, another affidavit was filed, alleging a debt to Messrs. *Gibson* and *Taylor*, to the amount of 361*2l.*, and a fresh notice was given for payment or security.

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Mr. *Swanston*, and Mr. *Rogers*, in support of the application, submitted, that the second affidavit ought to be taken off the file, it having been made in reference to the same debt, and the petitioner having sworn that no other existed. The debtor had complied with the requisitions of the statute, and ought therefore not to be harassed with the second proceeding. It is a fixed rule of law, that no man can be held twice to bail in the same action. The process of the Court has been abused by the Commissioner in this instance; and it would be most vexatious, to bring this gentleman a second time from Manchester to give security before the Commissioner in London.

Mr. *Bagshaw* appeared on behalf of the respondent.

Sir JOHN CROSS.—This application is one of a first impression, and there is no precedent to guide us on the subject. The first affidavit, perhaps inadvertently, alleged only a debt of 100*l.* and upwards, instead of specifying the whole amount; and the Commissioner, having no legal evidence of a higher debt than 100*l.*, accepted a bond for payment of 200*l.*, to cover whatever amount might be found due. But the creditor, finding he had failed in his object to secure the full amount of the debt really due, filed a new affidavit; and there is no law

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that I am aware of to prohibit him from so doing. Nor do I think this is any ground to warrant the Court in ordering the affidavit to be taken off the file. It may, perhaps, be a question, whether the applicant is not entitled to the costs of his first appearance, for which there was no actual necessity.

Sir GEORGE ROSE.—The proceeding of the creditor may probably be open to objection, as an act of bankruptcy; but there are no grounds shown for taking the affidavit off the file. If the proceeding should be held to constitute a sufficient act of bankruptcy, the affidavit must stand, as of course; but if it is held inoperative as an act of bankruptcy, it may become the subject of an action at law, or form a ground for applying to supersede. The amount of the security to be given is entirely a question for the Commissioner. The present application must be dismissed, with costs.

Ex parte HENRY ROWE.—In the matter of
HENRY ROWE.

Westminster,
June 11, and
Nov. 4.

The date of a fiat is *prima facie* evidence of the time of its being issued, within the meaning of the 6th section of the 6 Geo. 4. c. 16.

Semble, that the term "sued out," contained in that section, may be fairly held to mean "applied for."

THIS was a petition of the bankrupt to annul the fiat, on the following grounds, namely, that it was issued in bad faith; and that, being founded on a declaration of insolvency, it was not issued in sufficient time within the provisions of the 6 Geo. 4. c. 16. s. 6. The petitioner alleged, that at a meeting of his creditors on the 4th March last, he was induced to sign a declaration of insolvency, for the purpose of protecting his estate against the result of an action then pending against him, but

upon condition that it should not be made use of until it should be found necessary. It was alleged that, in breach of this condition, Mr. *Godson*, the petitioning creditor, caused the declaration of insolvency to be advertised in the Gazette of the following day, the 5th March. But, independently of this objection, the petitioner relied on the circumstance that the fiat was not sued out within the time limited by the act of parliament. It was sworn by a witness in support of the petition, that although the fiat was made to bear date on the 4th May, which was within the prescribed period, yet that, from inquiries made at the Bankrupt Office, the deponent was informed by one of the clerks there, that the signature of the Lord Chancellor to the fiat was not obtained before the 6th May, which was more than two months after the advertisement of the declaration in the Gazette.

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Mr. *Swanston*, and Mr. *Bacon*, in support of the petition. By 6 Geo. 4. c. 16, s. 6., it is provided, that a declaration in writing of the insolvency of any trader, filed by him at the Bankrupt Office, shall, after it is inserted in the Gazette, be an act of bankruptcy committed at the time such declaration was filed; but it is declared, that no commission shall issue on any such declaration of insolvency, "unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed." In the present case, the declaration of insolvency has ceased to be an act of bankruptcy, because the fiat was not sued out within the two months after the advertisement in the Gazette. It

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was determined in *Wydown's* case (a), that the actual issuing of the commission is performed by the application of the great seal and delivering the commission to the party. A fiat being now substituted for a commission, the act of *signing* the fiat must be considered of the same effect, as that of sealing the commission under the former Bankrupt Law. The fiat therefore, in this case, could not have issued (b) within the two calendar months after the insertion of the advertisement in the Gazette; for the advertisement was inserted on the 5th March, and the fiat was not signed until the 6th May. [Sir George Rose referred to *Watkins v. Maund* (c), where Lord *Ellenborough* said, that he considered that a commission of bankrupt had *issued*, when it was delivered out under the great seal.] [Sir *John Cross* also mentioned the case of *Ex parte Freeman* (d), where it appeared to be considered by Lord *Eldon*, that although the great seal had been affixed to a commission, it was inoperative while it remained in the hands of the Lord Chancellor; but that a delivery to a messenger, although the instrument was not taken out of the Bankrupt Office, was a delivery to the party.] The fiat must be *sued out*, according to the provisions of the act of parliament, within two calendar months after the insertion of the advertisement. We contend, that the term "sued out" means "issued;" and that the Lord Chancellor would not have signed the fiat, if he had

(a) 14 Ves. 89.

(b) In *Wydown's* case Lord *Eldon* said, "There may be considerable difference in the exposition of the words 'suing forth' and 'issuing' the commission; the one being the act of the creditor; the other the act of the Lord Chancellor." 14 Ves. 91.

(c) 3 Camp. 308.

(d) 1 Rose, 380.

known that the two months had expired after the advertisement was inserted in the Gazette.

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Mr. *Bethell*, *contra*, was stopped by the Court.

Sir JOHN CROSS.—I think the Court has no alternative but to dismiss this petition. The *date* of the fiat we must take to be *prima facie* evidence of the time of issuing it, unless contradicted by other testimony; and it appears to me, that there is not sufficient evidence to rebut that presumption. It is not denied, that the docket was struck within the two months. But it is alleged, on the authority of some indiscreet gossip of a clerk at the Bankrupt Office, that the signature of the Lord Chancellor was not attached to the fiat, until two days after it purports to bear date. This hearsay evidence is, I think, not receivable to contradict the presumption arising from the date of the fiat. But had it been even established in evidence, that the fiat was not in fact signed by the Lord Chancellor until after the expiration of the two months, it would probably have been immaterial; as if I was bound to put a construction on the words of the act of parliament, I should say that the expression “sued out” might be fairly held to mean “applied for;” and that the “suing out” was an antecedent act to the “issuing” of the fiat.

As to the imputation of bad faith on the part of the petitioning creditor, on the ground of its being understood between the parties, that the declaration of insolvency was not to be made use of unless it should be found necessary—who was to judge of the necessity? The bankrupt alleges, that it was not necessary to make use of the declaration. But how can we receive such

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Rowe.

evidence from the bankrupt himself? The imputation of bad faith, however, is contradicted by the other witnesses. For these reasons, I think there are no grounds for annulling the fiat.

Sir GEORGE ROSE concurred.

Petition dismissed—Costs out of the estate.

From this decision the bankrupt appealed to the Lord Chancellor, on the following

SPECIAL CASE.

Cor. Lord
Chancellor,
November 4,
1839.

THIS was the petition of a bankrupt to supersede the fiat issued against him. The act of bankruptcy was a declaration of insolvency duly filed and inserted in the London Gazette on the 5th March last. The docket was struck on the 4th May following. The fiat bore date on the same day. It was delivered out to the solicitor who struck the docket on the 6th May. The petitioner prayed a supersedeas, on the ground that the fiat was not sued out within two calendar months next after the insertion of the declaration in the Gazette, as required by the statute in that case made and provided. The Court ordered and decreed that the petition should be dismissed. The petitioner insists that the order is erroneous in matter of law, and ought to be reversed.

Mr. *Swanston*, and Mr. *Wigram*, for the appellants. By the 6 Geo. 4. c. 16. s. 6., the declaration of insolvency inserted in the London Gazette does not amount

to an act of bankruptcy, unless a fiat founded thereon shall issue in two months from the date of such declaration. In the present case, the fiat was not issued within the time prescribed. The declaration of insolvency bears date the 4th March, and the fiat, though purporting to bear date the 4th May, was not in fact signed, and much less issued, until the 6th May. The question in this case entirely depends upon the construction of the words "shall issue," and "sued out," in the statute before referred to. The definition given by Dr. *Johnson* to the verb "to sue" is, "to gain by legal procedure (a)." It is not, therefore, satisfied by the simple *procedure*, but requires the success of that procedure, namely, the attainment of the object, in order to complete the sense. The object of the legislature was, to free the insolvent from the consequence of bankruptcy attaching upon his declaration at the end of the two months, unless the fiat then actually issued; and, at that moment of time, the exoneration of the party is complete. In the present case if the statute is held to be satisfied, there can be no assignable time after which a party may consider himself to be safe, for in every case a fiat might be dated within the two months, and not be issued for six months afterwards; and yet it would be said to be good, because it was dated prior to the expiration of the two months. The affidavit of the peti-

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(a) *Johnson* gives also another definition of the word, namely, "to prosecute by law," illustrating its meaning by the well-known passage from St. Matthew's Gospel, Chap. 5, Verse 40:—"If any sue thee at the law, and take away thy coat, let him have thy cloak also." If this precept was always followed, by giving a plaintiff double what he claims, it might indeed more than justify the definition contended for in the argument; but it is greatly to be feared in these our days, that suitors do not now gain quite so much by *legal procedure*.

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tioner's solicitor, in support of the petition to the Court of Review, states that the fiat was not signed by the Lord Chancellor until two days after it bore date.

Lord COTTENHAM, C.—When the legislature gave a party desirous of appealing from the Court of Review the power of doing so, either on special case, or as the Lord Chancellor should direct,—which is, upon an original petition and affidavits,—it never meant that he was at liberty to adopt both forms of procedure. I cannot, therefore, in this case hear any affidavits, or travel out of the statement in the special case, which says expressly that the fiat bore date on the 4th May. That being so, I consider myself precluded from entering into any inquiry as to the day when the fiat was actually signed.

Mr. *Bethell*, and Mr. *B. S. Follett*, for the respondent, the petitioning creditor. There is here no question of law, or equity; on which an appeal can only lie from the Court of Review. The present case involves a mere question of fact, and therefore is not the subject of an appeal. [The Lord CHANCELLOR. How can the dispute about the meaning of the term “suing out” be considered in any other light, than as a question of law?] With regard to the question of the fiat not being delivered out by the officer till the two months had expired, the other side forgot the distinction between “suing out” and “issuing,” a distinction, which is thus expressly recognized by the provision of the act of parliament: “No commission shall *issue* thereupon, unless it be *sued out* within two months.” The delivery of the fiat out of the office must be held to constitute the *issuing*; and the application for the fiat by the petitioning creditor, and

the signature of it by the Lord Chancellor—which is assumed to have been affixed to it on the day it bears date, and therefore within the time,—must be comprehended within the term “suing out.” The *issuing* is consequent on *suing out*; for, unless the term “suing out” is equivalent to the presenting the fiat to the Lord Chancellor for his signature, there is nothing to which this expression in the act can refer. It is quite plain, that the mere delivery of the fiat to the officer—in other words, “the issuing” of it—need not necessarily fall within the two months; it is the *suing out* within that time, which constitutes its validity. But, moreover, on reference to the 81st section of the act, it is clear that the *issuing* of a fiat must be taken to be the date; for there the terms “date and issuing,” in the conjunctive, are used as synonymous. In the first provision of that section relating to contracts, the term “date and issuing” is used; and in the next part, as to executions, the word “issuing” alone is used; and the same in the 83d section. In the 86th the term “suing out” is resorted to, without any apparent distinction; so that we may safely refer all these three terms, the “date,” “suing out,” and “issuing,” to mean one and the same thing, namely, the presenting the fiat to the Lord Chancellor for his signature. In *Wydown's* case (a), Lord *Eldon* thus gives the true construction of the words:—“There may be considerable difference in the exposition of the words ‘suing forth’ and ‘issuing’ the commission; the one being the act of the creditor, and the other the act of the Lord Chancellor.” Now in this case the “suing out,” which is synonymous with “suing forth,” was completed by the creditor within the two

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(a) 14 Ves. 91.

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months from the date of the declaration of insolvency. But, in any way of looking at this case, this appeal must be dismissed. The date, as it appears on the fiat, is of itself conclusive. In any Court of Law, the date appearing on the face of a record, or an office-copy of it, is sufficient evidence of its actual date. If the date of a fiat depended on the precise time of the Lord Chancellor's signature, great mischiefs would arise. For whenever the Lord Chancellor happened to be absent from London, a creditor, having taken every equitable step for suing out a fiat, would be, by no fault of his own, precluded from that remedy which is expressly given to him by the act of parliament.

Mr. *Swanston*, in reply. The absence of the Lord Chancellor from London, or any other accident of that nature, would form no ground of excuse for not complying with the positive directions of the statute. There was no intention in the act to draw any distinction between "issuing" and "suing out" a commission. But were it otherwise, the "suing out" the fiat cannot take place before the document is complete, which is not the case until it is signed by the Lord Chancellor. Nor even at that point of time can it be said to be sued out; because, as long as it remains in the hands of the officer, the Lord Chancellor has the power to recall it. Lord *Eldon's* definition of the term "suing forth" in *Wydown's* case, makes against the construction contended for on the other side. But the date and suing out of a fiat are generally upon the same day; and therefore the question cannot very often arise, which is the subject of this discussion.

Lord COTTENHAM C.—The special case, by which alone I am bound in disposing of this objection, raises no question as to the date at which the act of the great seal was completed. It states, that the declaration of insolvency was inserted in the Gazette on the 5th March, and that the docket was struck on the 4th May, the fiat bearing date on the same day. It was not, however, delivered out to the solicitor who struck the docket, till the 6th May. The question is, therefore, whether the statute absolutely requires the fiat to be delivered out by the officer within the two months. Now, every thing that the creditor could do, and as I am bound to conclude, all the Lord Chancellor had to do, was completed within the time; but it appears the fiat remained in the office beyond the two months. I cannot think that was material. The “suing out” is, in my judgment, the “application for” the fiat; and it would be very hard, if the creditor should lose the benefit of his proceeding by any accidental circumstance delaying the signature to the fiat. He applies within the two months; and whenever he obtains possession of the fiat, this subsequent completion of the proceeding must relate to the time of such application, provided the delay does not arise from his own default. The rights of creditors are not to be affected by the delay in completing the act of the great seal, and I cannot consider the delivery out by the officer as being necessary to complete it. I am of opinion, therefore, that the act of parliament has been sufficiently complied with, and more especially when I look to the statement of the special case, which is perfectly unambiguous; and out of this I cannot travel. If indeed the statement in the special case had

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given rise to any doubt, I should have then thought it right to call for further inquiry.

Appeal dismissed, but without costs.

Serjeants' Inn
Hall,
July 9.

The Court will not permit a creditor to attend by himself, or his counsel, before the Commissioners at the opening of the fiat, for the purpose of opposing the adjudication; although he swears that he believes the party is not a trader, and that the fiat is issued for an improper purpose.

Ex parte COOKE.—In the matter of JOSEPH SCHOLES.

MR. *ANDERDON* moved, on the part of a judgment creditor of the party against whom a fiat had issued in this case, that he might be permitted by himself or his counsel, to attend before the Commissioners, on the opening of the fiat. The motion was supported by an affidavit of the creditor, in which he swore that he had reason to believe that the fiat was not sued out *bonâ fide*, but was intended to deprive him of the fruits of his judgment. It appeared, that in 1831 the applicant lent Mr. *Scholes*, who was then out of business, a sum of 400*l.* on the security of his promissory note. The note continuing unpaid, Mr. *Cooke* brought an action against *Scholes* to recover the amount due, in which the trial took place in June last, when a verdict was obtained for the 400*l.* On the 24th June the fiat issued. Mr. *Cooke* swore, that he believed that *Scholes* was not a trader within the bankrupt laws, and that the whole scheme was for the purpose of defeating the verdict, and not with a view to the distribution of assets. The Court had often granted an application of this nature, on the part of the bankrupt; though it was admitted that no precedents could be found, where an order had been made on the application of any other person. A judgment creditor may, however, at any time apply to the

Court to annul a fiat, which is issued to deprive him of the benefit of his judgment; and the same reason holds, for his application to prevent the adjudication of the bankruptcy by a less expensive process.

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Ex parte
Cook.

Sir JOHN CROSS.—The present application is admitted to be a new experiment, and wholly without a precedent, although the bankrupt laws have been in force for two centuries. There have been, no doubt, a few cases, where the bankrupt has been admitted to dispute the validity of the fiat at its opening; but this is the first instance within my experience, where the application has been made at the instance of a creditor. The same reason, which is urged for our granting this application, would hold for an application to a judge at the assizes to allow any party to appear by himself, or his counsel, before a grand jury, to oppose the finding of a bill of indictment by them, who are not to try the case, but to inquire whether there is any cause for finding the bill. So, this application is for the purpose of contesting the validity of a fiat before a tribunal, which is incompetent to try that question. The applicant in this case, a perfect stranger to the fiat, asks, merely *quia timet*, for some reason or other, for leave to go before the Commissioners, because he wishes to prevent the adjudication. The Court cannot accede to any such application.

Sir GEORGE ROSE concurred.

Application refused.

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*Serjeants' Inn
Hall,
July 9.*

Where certain creditors had succeeded in expunging various proofs, which had been improperly made under the fiat, the Court referred it to the Commissioners to allow them such costs as they should think reasonable.

Ex parte EDMOND MARGERISON and others.—In the matter of GEORGE HAWORTH and WILLIAM HAWORTH.

THIS was the petition of certain creditors of the bankrupt, praying that they might be allowed the costs of expunging various proofs under the fiat, out of the bankrupts' estate, to be taxed by the Commissioners. The petition stated, that the proofs had been made on numerous bills of exchange, amounting to 12,129*l.*, which had been given by the bankrupts without consideration, and were in the hands of colourable holders at the time of the bankruptcy. That the solicitor for the petitioners furnished the assignees with the particulars of these bills, and the proofs so improperly made on them, but that the assignees declined to interfere. That the petitioners, therefore, applied to the Commissioners to appoint a meeting to expunge these proofs, which meeting they attended by counsel, and succeeded in expunging all the proofs to the amount of 12,129*l.* Upon application to the Commissioners to tax the costs of the petitioners, and order the amount to be paid to them out of the bankrupts' estate, the Commissioners said they had no jurisdiction to do so, without an order of this Court. The petitioners therefore submitted, that as the result of their exertions had proved so beneficial to the bankrupts' estate, the Court would make the necessary order to entitle them to such costs.

Mr. *Keene*, in support of the petition, submitted, that as the assignees, who had had little trouble in the matter, in comparison with the petitioners, had got their costs

out of the estate, it was but just that the petitioners should also be indemnified for their expenses, having conferred so great a benefit upon the estate.

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Ex parte
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and others.

Mr. *Metcalf*, on behalf of the assignees, opposed the petition.

The COURT said, that the intent of the application was not to deprive the assignees of their costs; which, if that had been the case, would have afforded some grounds for their opposing this petition; and they referred it to the Commissioners to allow the petitioners such costs as they might think reasonable.

In the matter of WILLIAM JAMES.

THIS was an application to change the venue of a fiat from Southampton to London. The bankrupt resided at Southampton; but it was stated that his property was chiefly in London, where the act of bankruptcy was committed by the breach of an engagement to meet a creditor, and that great part of the property was supposed to be concealed in London in the hands of third persons, whom the bankrupt had preferred to other creditors. The petitioning creditor, and the witness to prove the act of bankruptcy, as well as those who could prove the concealment and fraudulent preference, resided also in London; and it was further urged, that the creditors who did reside at Southampton had often occasion to come to London.

Serjeants' Inn,
July 19, 1839.

Where the object of a fiat was to set aside a fraudulent preference to a creditor in London, and all the witnesses to prove that fact, and the requisites of the fiat, resided there, the fiat was directed to London, in preference to Southampton.

Mr. *Anderdon* appeared in support of the application.

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In re  
JAMES.

Sir JOHN CROSS.—As the object of the fiat is stated to be to overturn a fraudulent preference given by the bankrupt to the creditors in London, which can be perhaps better discovered by the examination of the witnesses in London, where the transaction took place, you may take the order, paying the bankrupt his expenses, which may be afterwards allowed to the petitioning creditor out of the estate.

*Serjeants' Inn,  
July 19, 1839.*

Fiat annulled on the ground of the party to the deed constituting the act of bankruptcy being petitioning creditor.

In the matter of COOK.

MR. ANDERDON applied to annul a fiat, on the ground that the petitioning creditor was a party to the deed intended to be set up as constituting the act of bankruptcy, which would of course render the fiat open to objection. The twenty-eight days had not yet expired, and the petitioning creditor offered no opposition. The application was made on behalf of another creditor, for the purpose of issuing a fresh fiat.

The COURT granted the application.

*Lincoln's Inn  
Hall, August 10.  
Westminster,  
November 4 & 6,  
1839.  
Cor. Lord Chan-  
cellor.*

Ex parte GEORGE HOLMES.—In the matter of  
JOSEPH GARNER.

A. accepted four bills for the accommodation of B., which B. indorsed and deposited with his bankers, to

THIS was an appeal from a decision of the Court of Review (a), on the following

(a) See *ante*, vol. 3, p. 662.

secure any floating balance. B. became bankrupt, when the bankers proved for a balance greatly exceeding the amount of the bills, excepting in their proof these bills, with others, as securities; and they afterwards received a dividend of two shillings in the pound on the amount of their proof. The bills were subsequently paid in full by A. Held, that A. had a right to call on the bankers to refund the amount of the dividend of two shillings on the amount of the bills. Reversing *Ex parte Holmes*, 3 Deac. 662.



## SPECIAL CASE.

1839.

Ex parte  
Holmes.

ON the 9th March 1837, a fiat was issued against the bankrupt, who was an innkeeper and coach proprietor at Dunchurch in Warwickshire, under which he was declared bankrupt; and *Robert Welchman, Benjamin Johnson*, and *John Bray*, were duly chosen and appointed assignees.

Previous to the said bankruptcy, the petitioner *George Holmes*, for the accommodation of the said bankrupt, and in order to serve and assist him in his business, accepted four bills of exchange, amounting in the whole to the sum of 523*l.* 15*s.* 6*d.*, drawn respectively by and made payable to the said bankrupt, or order; one, dated November 30th 1836, for the sum of 183*l.* 11*s.*, payable three months after date; another, dated December 30th 1836, for the sum of 137*l.* 14*s.* 6*d.*, payable three months after date; another, dated February 7th 1837, for the sum of 127*l.* 10*s.*, payable three months after date; and the other, dated February 7th 1837, for the sum of 75*l.*, payable two months after date. All the said bills of exchange were indorsed by the said bankrupt, and deposited by him before his bankruptcy with his bankers, Messrs. *Goodall, Gulson, & Co.*, as securities for any floating balance due, or which might become due, in respect of advances made by them from time to time to and for the bankrupt. The bankrupt had kept a banking account with the said bankers for many years before his bankruptcy, and the course of dealing between them was, that they were accustomed to require him to deposit with them such securities as he could obtain, before making him the required advances. Those securities generally consisted of bills of exchange and promissory

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Ex parte  
HOLMES.

notes; and upon former occasions the bankrupt had deposited with the said bankers bills of exchange to which the petitioner was a party, as drawer, acceptor, or indorser, for the like purpose, which were paid at maturity. The said bankers had no notice that the said bills were accommodation bills.

The said bankers proved under the fiat the sum of 752*l.* 14*s.* 11*d.*, as a debt owing to them by the said bankrupt, upon the balance of their account with the said bankrupt as his bankers; and at the time of making such proof, they exhibited and set forth securities which were then held by them for the said balance; and, amongst such securities so exhibited and set forth by them, were the said four several bills of exchange hereinbefore mentioned.

On the 10th October 1837, a dividend of two shillings in the pound was declared under the said fiat, and was then paid to the said bankers on the debt so proved by them as aforesaid, with the full knowledge of the petitioner, before he paid the full amount of the said bills.

The petitioner afterwards, by various payments, fully paid and satisfied the amount of the said bills to the bankers, as the holders thereof.

Previous to the last payment, amounting to 21*l.* 10*s.*, in the month of January 1839, the petitioner apprised the bankers, that he claimed to be entitled to stand in their situation, to the amount of the said four bills of exchange, under the said fiat, and to receive all future dividends on the amount thereof. And he also required the said bankers, upon payment of such balance, to allow to him the dividend of two shillings in the pound received by them as aforesaid, on so much of their said debt as equalled the amount of the said bills included in

the said proof made by them as hereinbefore mentioned ; but they refused to do so, and claimed to retain the same, there being still a large balance due to them from the bankrupt on account of the debt proved as aforesaid. The said bankers did not prove the said bills of exchange, specifically, as a debt or debts under the said fiat ; but the said bills were merely set forth by them, and exhibited under the said fiat, amongst other securities held by them for the said balance of 752*6*l. 14*s.* 6*d.*

On the 13th March 1839, a meeting for a further dividend was held under the said fiat, and the petitioner attended, claiming to prove for the sum of 523*1*. 15*s.* 6*d.*, as a debt justly and truly owing to him by the said bankrupt, under the circumstances before stated, being the amount of the said four bills of exchange, for which the petitioner was liable for the said bankrupt as aforesaid, and as being a debt for which he was liable for the said bankrupt, at the time of the issuing of the fiat against him ; but the Commissioners refused to allow the said debt, or any part thereof, to be proved by the petitioner.

On the 2nd April 1839, a petition was presented by the petitioner to the said Court of Review, and which was afterwards amended by an order dated the 18th April 1839, and which said amended petition, after stating partly to the effect herein-before set forth, prayed that the petitioner might be declared entitled, as between him and the bankers, to stand in their place with respect to their proof, to the extent of 523*1*. 15*s.* 6*d.*, and in respect of the past and future dividends on such proof to the extent of that sum ; and that the bankers might be ordered to refund and pay to the petitioner the amount of the dividend of 2*s.* in the pound on that sum ; or that, if necessary, the assignees might be ordered to pay the

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amount of such past dividend out of any subsequent dividends, which might be payable to the bankers on the balance of their proof, after deducting the amount of the petitioner's acceptances; and that the assignees might be ordered to pay to the petitioner all future dividends on the debt proved by the bankers, to the extent of the amount of the said four acceptances, and might be restrained from paying to them such future dividends, as well as any future dividends on the balance of their debt, until repayment to the petitioner of the dividend of 2s. on the amount of the petitioner's acceptances; or that the petitioner might be declared entitled to go in and prove under the fiat for the amount of such four acceptances, and to receive dividends thereon equally with the other creditors, not disturbing the former dividends; and that, in such last case, the proof of the bankers might be reduced, and ordered to stand only as a proof for the amount proved, less the amount of the petitioner's acceptances.

On the 25th May 1839, the said petition came on to be heard before the judges of the Court of Review; whereupon the said Court did order, that the petition, as against Messrs. *Goodall, Gulson, & Co.*, should be dismissed; and that the petitioner should pay to Messrs. *Goodall, Gulson, & Co.*, or to their solicitor or agent as therein mentioned, their costs of and occasioned by that application, such costs to be taxed as therein mentioned, if the parties differed about the same; and the said Court declared, that the petitioner was entitled to receive out of the estate of the bankrupt, instead of Messrs. *Goodall, Gulson, & Co.*, all future dividends declared under the fiat in respect of the said sum of 523*l.* 15*s.* 6*d.*, the amount of the petitioner's acceptances in the petition

mentioned, and included in the proof so made by Messrs. *Goodall, Gulson, & Co.* against the estate of the bankrupt. And it was ordered, that the costs of the petitioner, and of the assignees, to be taxed as therein mentioned, should be paid out of the estate of the bankrupt.

By which Order the petitioner alleges that he is aggrieved, so far as the same deprives him of a dividend under the said fiat; and the dismissal of his said petition against the said Messrs. *Goodall, Gulson, & Co.*, with costs.


Mr. *Swanston*, and Mr. *Rogers*, for the appellant, in addition to the cases cited in their argument before the Court of Review, referred to the case of *Martin v. Brecknell* (a), in which the obligee of a bond given by principal and surety, and conditioned for payment of money by instalments, had proved under a commission against the principal the whole debt, and received a dividend thereon of 2s. 7d. in the pound; and it was held, that he could only recover against the surety an instalment due, after making a deduction of 2s. 7d. in the pound on the amount of such instalment. The very same principle was also acted upon by the Court of Common Pleas in *Bardwell v. Lydall* (b). In that case the defendants had guaranteed the plaintiffs against debts to be contracted by one *L. Mayhew*, to the extent of 400*l.*, who became indebted to the plaintiffs to the amount of 625*l.*; upon which sum, having compounded with his creditors, he had paid them a dividend of 8s. 7d. in the pound, leaving a balance of 356*l.* due to the plaintiffs out of their whole claim; and it was held, in an action

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(a) 2 M. & S. 39.

(b) 7 Bing. 489.

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 HOLMES. brought against the defendants on their guarantee, that they were entitled to deduct the amount of the dividend of 8s. 7d. in the pound upon the 400l.

Mr. *Swann* appeared for Messrs. *Goodall & Co.*

Mr. *Steere*, for the assignees.

*Cur. adv. vult.*

6 November  
 1839.

LORD COTTENHAM, L. C.—In this case *Holmes*, for the accommodation of the bankrupt, accepted four bills of exchange for the amount of 523l. 15s. 6d., which were indorsed by the bankrupt and by him deposited with the bankers, as a security for any floating balance. These being mere accommodation bills, *Holmes*, as between himself and the bankrupt, was a mere surety for the 523l. 15s. 6d. It appears, that the bankers advanced upwards of 7000l. to the bankrupt, and proved the whole of such debt against his estate, and received a dividend of 2s. in the pound upon the whole of the debt. No part of the proof was upon the bills; but they were exhibited as a security. *Holmes*, afterwards, paid the whole of the 523l. 15s. 6d. to the bankers; and, by the order of the Court of Review, he has been declared entitled to receive all future dividends upon 523l. 15s. 6d., part of the debt proved by the bankers; but the Court refused to give to him the dividend of 2s. in the pound upon that sum already received, and dismissed the petition, with costs, as against the bankers.

This Order assumes, that *Holmes* was a surety for the bankrupt to the bankers for 523l. 15s. 6d. due to them, and that he paid such sum to them after the creditor had proved that sum against the bankrupt's estate; in which case, the 52nd section of the 6 Geo. 4. c. 16. declares,

that such surety shall be entitled to stand in the place of such creditor, *as to the dividends*, and all other rights under the commission, which such creditor possessed, or would be entitled to, in respect of such proof. Why then is the dividend of 2*s.* in the pound upon the sum of 523*l.* 15*s.* 6*d.* not to be received by *Holmes*? Is it not a dividend, as to which the act declares that the surety shall stand in the place of the creditor? Was not the latter but a right under the commission, which the creditor possessed in respect of such proof? Upon what principle is the surety entitled to the future, and not to the past, dividends? It was contended, that the security, not being for any specific part of the debt, but for a floating balance, the creditor was entitled to receive all the dividends upon the whole debt, and to come upon the surety for the difference, or so much as might be necessary to pay the creditor in full; upon the principle, that a creditor receiving money would be entitled to appropriate it to that part of the debt which is not secured. But the Order negatives the application of any such rule, by giving to the surety all future dividends upon the 523*l.* 15*s.* 6*d.*; and the principle of appropriation can have no application to a case, in which the payment is specifically on account of the debt secured; it being clear, that the payment of 2*s.* in the pound upon the whole debt, including the 523*l.* 15*s.* 6*d.*, was a payment specifically of 2*s.* on every pound of the 523*l.* 15*s.* 6*d.* If the creditor, therefore, who has received the whole 523*l.* 15*s.* 6*d.* from the surety, also retains the 2*s.* received as dividend upon that sum, he will be paid above 50*l.* beyond the amount of the debt secured. That the dividend so received cannot be treated as a payment generally on account of the whole debt, but must be con-

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sidered as a payment of part of each pound of the debt, is clear from the form in which it is made, and the law directing the payment; and several decisions have held that such payments are to be so considered; particularly the case of *Bardwell v. Lydall* (a). The earlier cases of *Paley v. Field* (b), and *Ex parte Rushworth* (c), proceeded upon a similar principle, and which is also recognized in *Martin v. Brecknell* (d), and *Ex parte Brooke* (e). If, then, the dividend received upon 523*l.* 15*s.* 6*d.* is to be attributed to that portion of the debt, which was secured by the four bills of *Holmes*, it is immaterial that the bankers had larger or other demands against the bankrupt; and if there had been no other debt but 523*l.* 15*s.* 6*d.* due to the bankers, the right of *Holmes* (paying that debt) to receive all the dividends upon such debt against the estate of the bankrupt would not be questioned. I am therefore of opinion, that the Order in this case ought to have been as it was in *Ex parte Brooke*, namely, for the creditor to repay to the surety the dividend he has received upon the sum paid by the surety. That part of the Order dismissing the petition, as against the bankers, with costs, must also be reversed.

I am perfectly at a loss to understand the principle, upon which the latter portion of the Order proceeded; because, as the Court made the Order adverse to the bankers in regard to the future dividends, it is quite clear that the petition against them was necessary, although the other parts of the prayer of the petition were rejected.

Order reversed.

(a) 7 Bing. 489.

(c) 10 Ves. 409.

(e) 2 Rose, 334.

(b) 12 Ves. 435.

(d) 2 M. & S. 39.



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Ex parte RICHARD SOUTHALL.—In the matter of

RICHARD SOUTHALL.

Westminster,  
June 12.

THIS was the petition of the bankrupt to annul the fiat, on various grounds, among which he disputed the validity of the petitioning creditor's debt, and the act of bankruptcy.

The fiat issued on the 16th February last, at which time the petitioner alleged he was perfectly solvent, and would have, after payment of all his debts, a surplus of 7000*l*. The petition stated, that the fiat was not issued for a legitimate purpose, but with the sole object of forcing the petitioner to dissolve his connection as a partner in a joint stock company called "The Birmingham Patent Horse Shoe, and Iron Tip and Heel Company." The petitioning creditor was an attorney, and had sued out the fiat on a bill of costs, which he alleged was owing to him by the bankrupt, amounting to 177*l*., but which debt the bankrupt disputed. The origin of it was stated to be as follows. The petitioner and one *William Billinge* were the assignees under a fiat against a person of the name of *Walker*, and employed Mr. *Smythies*, the petitioning creditor under the present fiat, as the solicitor. The assets under *Walker's* bankruptcy were not sufficient to pay the working of the fiat. An action of trover was brought by *Smythies*, on behalf of the assignees under that fiat, and against the sheriff and an execution creditor, to recover back a sum of money which had been levied on *Walker's* goods under a fieri facias; in which action the debt of the petitioning creditor, being insufficient to support the fiat, *Smythies* procured an order to substitute the debt of

Upon a petition by a bankrupt to annul a fiat issued by an attorney for the amount of his bill of costs, on the ground that the chief part of the bill consisted of charges for the prosecution of an action on the part of the bankrupt, in which he was nonsuited by reason of the gross negligence of the attorney, the Court referred it to the Registrar to inquire and report as to the quantum of negligence.

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*William Ryder*, the public officer of the Commercial Bank of England. At the trial of the action, the bankruptcy of *Walker* was disputed; and *Ryder*, being called to prove the existence of the substituted debt, was examined on the *voir dire* whether he was not a shareholder in the bank, and on his answering in the affirmative, his evidence was rejected, and *Smythies* not being able to prove the existence of such substituted debt by other evidence, the petitioner and his co-assignee, who were the plaintiffs in that action, were nonsuited; and the petitioner alleged, that they had in consequence been compelled to pay out of their own pockets 200*l.* and upwards for the costs of the defendants. The petitioner charged *Smythies* with having upon that occasion been guilty of gross negligence, in not having previously to the trial ascertained whether *Ryder* continued to be a shareholder of the company; as every public officer of a joint stock banking company is required by the 7 *Geo. 4. c. 46.* to be a member of such company, and *Smythies* had previously to the trial searched at the stamp office for the return under the act, showing *Ryder* to have been the public officer of that company. *Smythies* afterwards delivered to the petitioner a bill of costs for bringing the said action to the amount of 249*l.* 16*s.* 9*d.*, which he claimed of the petitioner and his co-assignee, the half of which sum constituted part of the petitioning creditor's debt under the present fiat. The petitioner alleged, that this bill of costs had never been properly taxed, and stated various objections to specific items in the bill; and he contended that, on account of the gross negligence of *Smythies* in the conduct of the above-mentioned action, he was not liable to pay the costs in respect of such action; or, at all events, that he was

only liable for the costs out of pocket; and he alleged, that if the items objected to were deducted from the bill, there would be much less than 100*l.* due from the petitioner to *Smythies*. It was also stated in the affidavits made by the petitioner and *Billinge*, his co-assignee, in support of the petition,—though there was no express allegation to that effect in the petition itself,—that shortly before the trial of the action, when the petitioner expressed himself apprehensive of the result of the trial, *Smythies* said, “I am so certain of winning, that I will take the responsibility upon myself; at all events, I will charge only costs out of pocket, should the result be unfavourable.”

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SOUTHALL.

Mr. *Swanston*, and Mr. *Chandless*, in support of the petition. There is no sufficient debt to support the fiat. For the petitioning creditor could not have recovered the amount of these costs in an action at law, on account of his gross neglect and misconduct in the prosecution of the action out of which these costs arise. It is a principle of law, that a plaintiff cannot recover in an action for work and labour, where the defendant can show, that in consequence of the plaintiff's neglect, the defendant has reaped no benefit from such work and labour. If the objection therefore to the plaintiff's demand is well founded, all the items in the bill relating to the action at law must be expunged.

Mr. *J. Russell*, and Mr. *Bethell*, appeared for the petitioning creditor,

Mr. *Bacon* for the assignees.

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SOUTHALL.

Sir GEORGE ROSE suggested, that an action at law was the proper mode to try the question of negligence; but

The COURT, by consent of the parties, made the following

ORDER: that it be referred to Mr. Gregg, the Deputy Registrar, to tax the bill of costs of the said *Henry Smythies*, and to ascertain and certify what is due to him in respect of the said bill; and in making such taxation, the Registrar is to take into his consideration, whether there is any, and if any, what part of such costs, which the said *Henry Smythies* is not entitled to recover, in respect of his imputed negligence. That all necessary and proper parties are to be examined upon interrogatories or otherwise, and to produce upon oath, all books, papers, and writings. That the said *Henry Smythies* is to account for all sums of money, if any, received by him on account of the said bill of costs. That the Registrar is to proceed upon such taxation *de die in diem*, and to be at liberty to state special circumstances, at the request of either party; And that the further consideration of the matters of the petition be adjourned, and costs reserved, until the Registrar shall have made his certificate; with liberty for either party to apply.

In pursuance of the above order, Mr. *Gregg* made his report, whereby he certified, that he had considered the bill of costs, which he had taxed, and allowed at the sum of 15*l.* 11*s.* 9*d.*; and he also certified, that there was no part of such bill which *Smythies* was not entitled to recover by his imputed negligence; and that *Smythies* had accounted on oath before him for all sums of money received by him on account of such bill, and that there was then due and owing to him in respect thereof the sum of 12*l.* 11*s.* 9*d.*

The bankrupt now presented a petition, excepting to the Registrar's report, after having previously carried in before the Registrar certain objections to the same effect, which were subsequently turned into exceptions.

Mr. *Swanston*, and Mr. *Chandless*, in support of the exceptions. There was an allegation in the original petition, that *Smythies* agreed to take only costs out of pocket, if *Southall* and his co-assignee would consent to go on in the action; and the Registrar, in taxing the bill, has not taken this agreement into his consideration. Now, the object of the reference was for the Registrar to ascertain, whether there was a good petitioning creditor's debt; and in doing so, he ought to have taken into his consideration any agreement between the parties, as to the amount of the charges. In *Denn v. Scroope*(a), where an agreement was entered into by a client with his attorney to pay him at a certain specified rate for business to be done, it was held, that the charges made according to such agreement might be allowed on taxation, if the Master, on inquiring into them, considered them proper. In that case, there was merely a general

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Westminster,
Nov. 25.

On a reference to the Registrar to tax a solicitor's bill of costs, and ascertain what is due in respect of such bill, he is bound to inquire into the existence of an alleged agreement of the solicitor to charge only costs out of pocket, and to take such agreement into his consideration, in ascertaining what is due on the bill.

The Registrar having omitted to do so, the matter was referred back to him for this purpose.

(a) 2 B. & Adol. 581.

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order to tax the bill; but it was held, that the Master might have reference to the special contract between the parties; and Lord *Tenterden* says, "The Master must exercise his judgment, as to the propriety of allowing the charges, according to the circumstances laid before him." There is no doubt, that an agreement of an attorney to charge only a certain sum for business done, is binding on the attorney. For, where in defence to an action on an attorney's bill, the defendant set up an agreement, by which the plaintiff undertook to conduct his suit without charge, in consideration of having his conveyancing business,—it was held no answer to such an agreement, that the defendant had employed other persons to draw his leases; as the plaintiff should either have given notice to the defendant to discontinue the agreement, or have resorted to a special action for the breach of contract; *Parker v. Harcourt* (a).

Mr. *J. Russell*, and Mr. *Bethell*, *contrâ*. The object of the reference to the Registrar was, to inquire whether any payments were made by the petitioner, in part discharge of the solicitor's bill. [Sir *J. Cross*. The question appears to me to come to a very narrow point. Was not the officer, under this order of the Court, bound to ascertain what was due?] The duty of the Registrar was to ascertain what was due, with reference to the amount of the charges in the bill. Part of the order is, that the officer should take into his consideration, whether there was any, and if any, what part of such costs, which *Smythies* was not entitled to recover, in respect of his imputed negligence; but there is not a word in the order about any special contract to take only

(a) 5 Esp. 249.

costs out of pocket. In interpreting the order, therefore, any question arising on this alleged special contract must be taken to have been abandoned. This appears to have been an order *by consent*; the petitioner, therefore, if he had not abandoned the question of the contract, would have taken care, by his counsel, to have had that question inserted in the order, as well as the other point. As to stating special circumstances, the Registrar could only do so *secundum subjectam materiam*; he was not warranted in stating any thing unconnected with the existing inquiry. Any thing connected with the question of negligence, which was the subject of the order, might have been stated by the Registrar; but not any matter which was not specified in the order.

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SOUTHALL.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—In disposing of these exceptions to the Registrar's report, we must not forget what was the nature of the inquiry directed by the Court. The original proceeding before the Court was a petition to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt. It is alleged on the face of that petition, that the petitioning creditor, who was employed as the attorney in the action brought by the present bankrupt and his co-assignee under *Walker's* bankruptcy, undertook, in case the plaintiffs would proceed with such action, only to charge the amount of costs out of pocket. If the fact was so,—if the solicitor did so agree,—and the amount of the costs out of pocket would have been under 100*l.*, it would have been the duty of the Court to annul the fiat. The Court, there-

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 SOUTHALE.

fore, referred it to the Registrar, not only to tax the bill of the solicitor, but to ascertain and certify what was really due to the petitioning creditor, in respect of his bill of costs. To exclude from the Registrar's consideration the question, whether there was such an agreement on the part of the solicitor, would be no less than a denial of justice; for that question formed the very gist of the inquiry. Then, could the Registrar ascertain what was due, without taking into consideration all the circumstances of the case, and inquiring into the existence of this alleged agreement? It appears to me, therefore, that the officer ought to have had regard to that question in the course of the inquiry; and, as he has omitted to do so, that he ought to review his taxation.

Sir GEORGE ROSE.—The question is, supposing the petitioner could have adduced evidence of a contract on the part of the solicitor to charge only costs out of pocket, whether the Registrar ought not to have stated that as a special circumstance. It is alleged in the present petition before the Court, that the Registrar was called upon to state special circumstances, and that he refused to do so. Now, ought he not to have complied with the requisition of the petitioner in this respect, in obedience to the order of the Court? I admit, that sufficient was alleged in the original petition, to have justified the Court in giving special directions as to an inquiry into the existence of this agreement. But the inquiry might unquestionably have been gone into, under the direction in the order to state special circumstances; and I think the Registrar was wrong in not giving the parties the benefit of stating special circumstances, when required to do so. The question really comes to this,—whether

the solicitor could have recovered the amount of this bill of costs in an action at law; for if he could not have recovered to the extent of 100%. in an action, and this contract was a good defence to such action, he could not take out a fiat. It must consequently be referred back to Mr. *Gregg*, to inquire and report whether there is any such agreement.

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Mr. *Bacon* appeared for the assignees.

The ORDER was, that it be referred back to Mr. *Gregg* to review his certificate as to the taxation of the costs of the action at law; and that in ascertaining what was due from the petitioner, as directed by the former order, the Registrar was to have regard to the agreement, if any, in respect of which the said *Henry Smythies* was only to charge the costs out of pocket: that the further consideration of the matters of the petition, and the costs of the present application, should be reserved until after the Registrar should have made his further certificate; with liberty for either party to apply.

Ex parte HENRY SMYTHIES.—In the matter of
RICHARD SOUTHALL.

THIS was a petition for the rehearing of the petition, on which the last-mentioned order was made in the preceding case. After stating the facts therein detailed, the petition prayed also that the second order might be rescinded.

Serjeants' Inn,
July 9 and 16
1840.

The Court refused to rehear the petition, or rescind the order, in the last-mentioned case.

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SMYTHIES.

It appeared, that in obedience to the last-mentioned order, the Registrar had since made his report, dated the 21st of April 1840, whereby he certified that he had reviewed his former certificate as to the taxation of the costs of the action at law, and that in ascertaining what was due from the bankrupt to *Smythies* he had regard to the alleged agreement, in respect of which *Smythies* was only to charge the costs out of pocket, and that having regard to such agreement, there was then due and owing to *Smythies* in respect of such bill of costs the sum of 77*l.* 16*s.* 6*d.*

Mr. *J. Russell*, in support of the petition. The Court had no jurisdiction to make the second order. The first order upon the hearing of the original petition appears, on the face of it, to have been made *by consent*; and when an order is made *by consent*, nothing afterwards can be added to, or taken from, it. The Court therefore had no right to engraft on the second order a direction to the Registrar, in his taxation of costs, to have regard to the alleged agreement on the part of the petitioner to charge only costs out of pocket. In the original petition, although the bankrupt alleges that Mr. *Smythies* was only to charge costs out of pocket, he does not allege any agreement of that nature, nor any consideration for such agreement.

Mr. *Swanston*, and Mr. *Chandless*, *contrà*. The present petitioner has in some measure acquiesced in the order he now seeks to set aside; for he attended by his counsel several times before the Registrar, and opposed the execution of the order, instead of coming to this Court with a petition to rescind it. But we contend,

that in the execution of the common order for the taxation of an attorney's bill, it is perfectly competent for the taxing officer to inquire, whether there was any agreement on the part of the attorney to take only costs out of pocket. The original order was not strictly a consent order; for Mr. *Smythies* was liable to an action for damages for his imputed negligence, and it was to prevent the adoption of any such proceedings that he consented to the order for taxation of his bill in the terms in which that order was pronounced. On the result of the taxation of the solicitor's bill, in this case, depends not only the validity of the petitioning creditor's debt, but also the validity of the act of bankruptcy; for if 100*l.* is not found to be due from the bankrupt, there would be no act of bankruptcy in not giving security for the debt under the act for the Abolition for Imprisonment for Debt; and it is by virtue of a proceeding under that statute, that the act of bankruptcy in this case is attempted to be established. The justice of the case is entirely with the bankrupt.

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SMYTHIES.

Mr. *J. Russell*, in reply. On the reference to the Registrar to tax this bill, he had no power to take into his consideration any alleged agreement of the solicitor to take only the costs out of pocket. This was expressly determined in the case of *Evans v. Taylor* (a), where the Court of King's Bench held that the Master, in taxing an attorney's bill, had improperly inquired whether there was any agreement to do the business for costs out of pocket. [Sir *George Rose*. There is a difference perhaps between a common order for taxation, and a special order, like the one in question in this case. And as to

(a) 2 Dowl. 349.

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the argument founded on its being an order by consent, the Court would have made the order, without any consent. It was a matter more convenient to be inquired into by the Registrar, than to have been the subject of an action at law.] It is a matter of no moment to me, whether my consent was necessary, or not, for the validity of this order. The Court ought never to have referred it to the Registrar to try a question of negligence, by affidavit. [Sir *John Cross*. What do you say to the argument of the other side, that the question as to the inquiry into the alleged agreement was necessarily involved in the execution of the first order, and that the Court intended to include a direction to the effect in the first order?] I come here complaining of the second order, and praying that it may be rescinded; I care not what the Court intended by the first order. That order, being an order *by consent*, is the order of the parties, and cannot afterwards be modified by the Court, without the like consent of both parties to the order. I have resisted the inquiry at every step before the Registrar, and have established a case of subornation of perjury against the party on whose affidavit the second report of the Registrar is founded.

Sir JOHN CROSS.—There are some circumstances in this case, that involve the construction of the first order in some degree of uncertainty, and serve to justify the present application. I do not find, that the original petition alleges any where the existence of an agreement on the part of Mr. *Smythies* to do the business for costs only out of pocket, and the prayer merely asks that the question of negligence may be taken into consideration. But I find it alleged in one of the affidavits, that the so-

licitor called on his client, and tried to persuade him to bring an action, saying, "I will lay my life that the action will succeed; and if you will consent to bring it, I will only charge costs out of pocket, if the result should prove unfavourable." Now, as the first order expressly directs the Registrar to ascertain what is due to the solicitor in respect of his bill of costs, it seems to me, that the first order did virtually involve an inquiry by the Registrar into the existence of the alleged agreement; for he could not correctly ascertain what was due to the solicitor, without taking that fact into his consideration. The Registrar, however, forbore to put this construction upon the first order; and the Court then by its second order directed the registrar, in ascertaining what was due from the petitioner (as directed by the first order), to have regard to the agreement, if any, in respect of which the solicitor was only to charge costs out of pocket; and the Registrar has made his second report, in obedience to the last-mentioned order. In that state the matter at present stands. A petition is now presented by the solicitor to rescind the second order. It is competent for the Court, no doubt, to begin *de novo*, and make a final order on a rehearing of the original petition. I own I could wish the practice of the Court to be, that every material fact should be alleged by a party in his petition, as well as stated on affidavit. The fact, however, of the alleged agreement is positively sworn to in one of the affidavits. I apprehend it would have been competent to the Court itself to inquire into the existence and validity of any such agreement, and I should have been better satisfied if the Court itself had entered into the investigation, and not delegated its inquisitorial powers to one of its officers. It is likely, if the only evidence was, that the attorney

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did not, until the very day before the trial of the action, make use of the expression, "I will only charge costs out of pocket," the Court might not have considered that as a binding agreement; for, before that period of time, the greater portion of the costs must have been already incurred. I am not quite satisfied with the previous proceedings in this matter, but do not think, altogether, that there is sufficient ground for a rehearing of the original petition.

Sir GEORGE ROSE.—I have already intimated my opinion, that the consent of the solicitor, who is the petitioning creditor under this fiat, was perfectly unnecessary, to enable the Court to make the order it did on the hearing of the original petition. On a petition to supersede, on the ground of a bad petitioning creditor's debt, this Court, of necessity, on a question of debt or no debt, takes into its consideration every material circumstance involved in that question. Where I find it alleged, that a solicitor, who sues out a fiat on his bill of costs, agreed to charge only costs out of pocket, can it be said that it is not a most material part of the question, to inquire into the fact of any such agreement? What the Court had power to do itself on this occasion, it delegated to its own officer, before whom a matter of account might be more conveniently gone into. It is quite enough that such an agreement was set up by the bankrupt, in deduction of the amount of a solicitor's bill of costs, to render such an inquiry necessary. The order pronounced by this Court, on the hearing of the original petition, expressly directed the Registrar to state special circumstances; and whether there was an agreement, or not, on the part of the solicitor, to charge only costs out

of pocket, was a special and material circumstance in the case. When the Registrar, therefore, made his report, without stating that as a circumstance, it was competent to the Court to send the matter back to the Registrar to review his certificate, and to give him more particular directions as to having regard to the alleged agreement. This was no enlargement of the original order; it was only directing the Registrar to work out more explicitly the requisitions of the first order, by taking into his consideration one of the special circumstances, which he had omitted to notice in his report of what he had done in obedience to that order. My present impression is, that the second order was right, and that there are no grounds for a rehearing.

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Mr. *Russell* intimated an intention of appealing to the Lord Chancellor.

Mr. *Swanston* then applied to the Court to re-answer a petition which had been presented by the bankrupt, to confirm the report of the Registrar under the second order; which the Court directed accordingly.

Mr. *Swanston*, and Mr. *Chandless* now applied, on petition, to have the Registrar's report confirmed, and that the rest of the petition,—which was to annul the fiat, on the ground of such report,—might stand over to a future day. They contended that they were entitled to an order, as the petitioning creditor did not appear.

July 21.

Sir JOHN CROSS.—How can you ask for an order to confirm the Registrar's report, when the validity of the

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order, on which that report is founded, is a question now pending before the Lord Chancellor?

Mr. *J. Russell* said, that he did not appear for the petitioning creditor, as he had no notice of this application.

*Note:* It was finally arranged between the counsel for both parties, with the sanction of the Court, that all the petitions in the matter should be set down for hearing on a future day.

July 23 & 24.

A party cannot at the same time apply to confirm, and except to, the Registrar's report; he must make his election, whether he applies to confirm, or except.

The matter was now again brought before the Court on two petitions, one being the petition of the bankrupt to confirm the Registrar's report on the second order: the other being the petition of *Smythies*, the petitioning creditor, excepting to such report. It was also added in the prayer of the petition to confirm the report, that if *Smythies* should except to such report, and the Court should allow such exception, then that the petitioner might be allowed to except, or that this petition might be deemed and taken as exceptions to the said last-mentioned report, in respect of certain objections of the petitioner to such report, which he had carried in before the Registrar.

Mr. *Swanston* and Mr. *Chandless*, in support of the first petition. If this report is confirmed, we are content. But if the other side are successful in their exceptions to it, we wish to fall back on our exceptions to the first report.



Sir GEORGE ROSE.—You must decide, whether you now apply to confirm, or except to, the report. You cannot do both.

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Mr. *Swanston* then waived the exceptions, and said, they would go upon the petition to confirm the second report.

Mr. *J. Russell* then proceeded to open the petition excepting to the report. The exceptions were as follow :—

1st. Because the Registrar, in making the inquiry whether there was any agreement, in respect of which the said *Henry Smythies* was only to charge costs out of pocket, read the affidavits of *Thomas Southall* and *John Wigley*, filed in support of the said alleged agreement; whereas he ought not to have received the said affidavits, or any affidavits, or any alleged evidence, in support of the said alleged agreement; inasmuch as there was not before him any state of facts, or charge, stating the particulars of the said alleged agreement, or when it was entered into, or putting the said agreement in issue with proper precision and certainty of averment.

2d. Because, in making the said inquiry, the said *Francis Gregg* read the affidavits of *Thomas Southall* and *John Wigley*, which he ought not to have done; inasmuch as the said *Henry Smythies*, by his solicitor, always insisted before the said *Francis Gregg*, both by parol and by written protest, that the question was one which ought not to be tried, and that he never had consented, and would not consent, and did not consent, to its being tried on affidavit, or in any way except by the

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evidence of witnesses competent in point of law, and given in such a way as would subject them to cross examination, and enable him to ascertain by the examination of the individuals themselves, whether they were competent witnesses.

3d. Because, even if the said *Francis Gregg* was right in trying the said question on affidavit, he ought not to have received the affidavits of the said *Thomas Southall* and *John Wigley* in support of the existence of the said alleged agreement; because the same were not filed until the 17th December 1839, after the solicitor of the said *Richard Southall* had repeatedly stated that he had no more evidence to offer, and the case was before the said *Francis Gregg* for his judgment, and he was about to prepare the draft of his report; and also because the said *Thomas Southall* was the son, and had been in the service, of the said bankrupt at the time of his bankruptcy; and the said *John Wigley* was the servant of the said bankrupt at the time of his bankruptcy, and still is in his service, and there was reason to believe that they were creditors of the said *Richard Southall* at the date of the fiat, and interested parties; and also because the said affidavits were made, with a view to prove only alleged admissions made by the said *Henry Smythies*, which were no where stated or charged, or in any way put in issue.

4th. Because the said *Francis Gregg* hath reviewed his certificate as to other matters, besides the costs of the said action at law, to wit, the costs of opposing a motion made in this Honourable Court in the matter of *Richard Walker*, a bankrupt, to rescind an order, which had been obtained on the petition of the said *Richard Southall* and his co-assignee, for the substitution of an-

other petitioning creditor under the fiat against the said *Richard Walker*.

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5th. Because, in reviewing the taxation of the costs of opposing such motion, the said *Francis Gregg* had regard to the taxation of the bill of costs carried in by the respondents under the order made on that motion, and which costs were then taxed, as between party and party, at the sum of 9*l.* 14*s.* 8*d.* ; and the said *Francis Gregg* hath taxed off in one sum all the costs of opposing such motion, and hath allowed to the said *Henry Smythies* only the said sum of 9*l.* 14*s.* 8*d.* ; and the said *Francis Gregg*, in so reviewing his taxation of the costs of opposing such motion, hath not allowed to the said *Henry Smythies* even his costs out of pocket, and hath not allowed to the said *Henry Smythies*, as part of such costs out of pocket, the charges of the London agents of the said *Henry Smythies* ; whereas the said *Francis Gregg*, even if he were right in finding the existence of such alleged agreement, and in considering the costs of opposing such motion to be a part of the costs of the action at law, ought to have allowed to the said *Henry Smythies* all costs out of pocket, and as part of these, the charges of the London agents of the said *Henry Smythies* in opposing such motion.

6th. Because the said *Francis Gregg* hath not allowed to the said *Henry Smythies* the costs out of pocket, paid by the said *Henry Smythies* for himself and a witness, in going to, staying at, and returning from Warwick to try the said action at law.

7th. Because, in ascertaining what is due from the said *Richard Southall* to the said *Henry Smythies*, the said *Francis Gregg* has had regard to the alleged agreement, in respect of which it is alleged that the said *Henry*

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Smythies was only to charge the costs out of pocket; whereas the said *Henry Smythies* never entered into the said alleged agreement, and regard ought not to have been had to such alleged agreement, in ascertaining what was due from the said *Richard Southall* to the said *Henry Smythies*.

8th. Because the said *Francis Gregg*, by his said report, has found that there is now due and owing to the said *Henry Smythies*, in respect of his said bill of costs, the sum of 77*l.* 16*s.* 6*d.*; whereas he ought to have found that there was due and owing to the said *Henry Smythies*, at least, the sum of 124*l.* 11*s.* 9*d.*


On a reference to the Registrar, it is not incumbent on a party to bring in a formal state of facts, if it is not required by the Registrar.

Mr. J. Russell, as to the first exception. By the first order which the Court made in this matter, no notice whatever was taken of the agreement now set up; in proof of which the Registrar received the affidavit of *Richard Southall* and *John Wigley*. If the Lord Chancellor makes a reference of any matter to a Master, it is indisputable that the party should bring in a formal state of facts, without which the Master cannot proceed in the inquiry. As this was not done in the present instance, it was wholly out of the power of *Mr. Smythies* to meet the case set up by the bankrupt before the Registrar. [*Sir J. Cross*. There are the affidavits stating the particulars of the agreement.] The affidavits can only be read in the Master's office after the party has brought in a state of facts; *Willan v. Willam* (a).

Mr. Swanston, and *Mr. Chandless*, *contrà*. Every one who knows any thing of the proceedings in the Master's office must be aware, that a state of facts is only requi-

site, when the Master asks for it himself; and this he only does, where there is great intricacy and complication of facts. In that case, the Master requires a state of facts, for his own satisfaction. But it is not imperative on the Master to call for it; no one ever heard of exceptions to a Master's report, because he had not thought it necessary to call for a state of facts. No authority can be cited for such a position. The mere allegation of the agreement, in the present case, was quite sufficient for the information of the Registrar; he did not require any additional statement on a proceeding for the taxation of costs. Any state of facts would only be an extract from the affidavits, which contained all the information he could want. It never was the practice in bankruptcy, in references before the Master, to carry in any state of facts,—a proceeding which would cause double expense, and at the same time be wholly unnecessary.

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Mr. *J. Russell*, in reply. The Registrar, in his report, does not specify any actual agreement on the part of *Smythies* to take only costs out of pocket. He merely states, that he had regard to the alleged agreement, without finding the fact, whether there was an agreement or not. This is not merely a defect in form, but a defect in the substance of the report.

Sir JOHN CROSS.—Before the Court decides on the validity of this exception, it will be necessary that we should direct our attention to the position in which the case at present stands. Although the original petition presented by the bankrupt contained no express allegation that *Smythies* agreed to charge only costs out of pocket; yet the affidavit in support of that petition

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alleged the fact. The existence of such agreement, therefore, was not an afterthought on the part of the bankrupt. In the first report made by the Registrar, he certified that a particular sum was due from the bankrupt to *Smythies*; but the report took no notice whatever of the alleged agreement. The Court, therefore, ordered that it should be referred back to the Registrar to review his report, and that in ascertaining what was due from the bankrupt, as directed by the former order, the Registrar was to have regard to the agreement, if any, in respect of which *Smythies* was only to charge the costs out of pocket. This direction cannot be considered any addition to the former order; it was merely for the purpose of informing the officer, that he had not fulfilled the intention of the Court in the execution of the first order. In his second report, the Registrar states that he had reviewed his former certificate as to the taxation of the costs, and that in ascertaining what was due from the bankrupt to *Smythies*, he had had regard to the alleged agreement. What agreement? Why the agreement alleged in the petition. If the Registrar had not found that such an agreement existed, he could not have had regard to it, in ascertaining what was due from the bankrupt to *Smythies*. It is certainly new to me, that this Court is bound to send a formal issue to its officer, when it directs him to make an inquiry. For these reasons, I am of opinion, that the first exception must be over-ruled.

Sir GEORGE ROSE concurred.

On a reference
to the Registrar,
the affidavits

Mr. *J. Russell*, in support of the second exception. The Registrar received the affidavits of the bankrupt.

and of *Wigley*, in proof of the existence of the alleged agreement; which he ought not to have done. And whether the affidavits were receivable, or not, it becomes a question for the Court to consider, whether the discretion of the Registrar has not been unwisely exercised in acting upon them. Mr. *Smythies* has pledged his oath, that no such agreement as that alleged had ever been entered into by him, and that improper means had been used by the bankrupt to procure affidavits in support of such alleged agreement. The Registrar ought not to have tried such a question on affidavit; but ought to have examined witnesses *vivâ voce*, so that they might have been subjected to cross-examination.

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filed in support
of the petition
are receivable
by him in evi-
dence; and he
is not bound to
examine the
parties *vivâ*
voce.

Sir GEORGE ROSE.—In *Ex parte Jackson* (a), where a petition had been referred to the Master, and his report had been excepted to, on the ground that he had admitted in evidence the affidavits which had been filed in support of the petition,—and it was contended that in the reference of a matter in bankruptcy, the Master was bound by the same rules of practice as on a reference in a cause; Lord *Eldon* said, that he doubted the analogy which had been contended for between proceedings in bankruptcy, and the proceedings in a suit; and he decided that affidavits, which might have been read at the hearing of the petition in Court, might be read in evidence by the Master. I will take upon myself to say, that such has ever been the practice in bankruptcy. If improper affidavits have been used in the present case before the Registrar, that might have formed a good ground of exception to the report. But there is here no objection on that ground. In my opinion, the course taken by

(a) 1 Rose, 45.

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the Registrar is quite regular; and the second exception therefore falls to the ground.

Sir JOHN CROSS concurred.

Mr. *J. Russell*, in support of the third exception. The Registrar ought not to have received the affidavits of *Thomas Southall* and *John Wigley*, after the bankrupt's solicitor had stated that he had no more evidence to offer, and the Registrar was about to prepare the draft of his report. There were objections, also, which more especially applied to the admissibility of these two witnesses; for one was the son, and the other the servant, of the bankrupt; and they were both in his service at the time of his bankruptcy. Moreover, there was reason to believe that they were creditors of the bankrupt. The affidavits also only go to prove alleged admissions made by *Smythies*, which were nowhere stated or charged in the petition. In the Court of Chancery you cannot put in evidence before the Master admissions of parties, which were never put in issue in the pleadings in the cause.

The COURT overruled the third exception.

On a reference to the Registrar to tax the costs of an action brought by assignees, he may tax the costs of an application to this Court for an order to substitute another petitioning creditor's debt, for the purpose

Mr. *Russell*, in support of the fourth exception. The Registrar has exceeded the authority given him by the Court; inasmuch as he has reviewed his certificate, not only as to the costs of the action at law, but also as to the costs of opposing a motion made in this Court in the matter of *Walker's* bankruptcy, to rescind an order obtained on the part of *Richard Southall* and his co-assignee, for the substitution of another petitioning cre-

ditor under the fiat against *Walker*. The Registrar has made his report on an affidavit, which was agreed to be taken off the file. [Sir *J. Cross*. If that is so, it deserves our serious consideration. But the Court has already said, that the proceedings under both the first and second order constituted all one continuous inquiry.]

I object to the Registrar acting on the affidavits on which he made his first report, as they are not referred to in the second report. [Sir *John Cross*. Your argument applies merely to the *taxation* of the bill of costs. But the Registrar had a larger duty to perform, namely, to ascertain what was due to the petitioning creditor. The affidavit of *Wigley* is material to that branch of the inquiry; for he swears, that when *Southall* shortly before the trial of the action expressed his fears of success, *Smythies* said, "I told you before I commenced the action, that I would only charge costs out of pocket, if the result was not successful."] The Registrar has dealt with the costs of a former petition to this Court, which he was not warranted in doing by the terms of the order. That is strictly confined to the taxation of the costs of the action at law. [Sir *George Rose*. If the order was confined wholly to the taxation of the costs of the action, the exception would be good; but the order extends to ascertaining what was due.]

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of enabling the
assignees to
recover in such
action.

Mr. *Swanston*, and Mr. *Chandless*, *contrà*. The costs of opposing the motion in this Court in *Walker's* bankruptcy, to rescind an order made for the substitution of another petitioning creditor's debt, were incidental to the action; for the object of obtaining the order of substitution was for the purpose of establishing a good petitioning creditor's debt, to enable the plaintiffs to suc-

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ceed in the action. The order to tax the costs of the action at law means not only the costs of the action, but the costs that were occasioned by the action. The defendant in that action opposed the substitution of another petitioning creditor's debt, which was essential to the plaintiff's right of recovery in the action.

Sir JOHN CROSS.—On reference to the Registrar's minute book, it appears that the application to the Court, to substitute another petitioning creditor's debt in *Walker's* bankruptcy, was for the express purpose of using the order in the action then pending, to which the costs now ordered to be taxed relate. The costs of the proceeding in this Court must therefore be considered as but incidental to those of the action. The Registrar has reviewed his former report as to the taxation of the costs of the action, and in doing so has not only had regard to the alleged agreement, but has taken into his consideration the costs of the proceedings in this Court, which affected the right to recover in the action. And there is no reason to say that the Registrar has done wrong.

Sir GEORGE ROSE concurred.

Mr. *Russell* in support of the fifth exception. The Registrar has allowed only 9*l.* 14*s.* 8*d.* for the costs of opposing the motion to rescind the order for the substitution of the debt. We say, that our costs out of pocket exceed that sum; for the Registrar has not allowed the charges of the London agents of Mr. *Smythies*.

Mr. *Swanston*. The original charge for opposing the

motion for rescinding the order of substitution was 38*l.*, and they were taxed at 9*l.* 14*s.* 8*d.* We say, that the Registrar, in allowing this sum, has allowed more than the costs out of pocket, even including the payments to the agent.

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The COURT overruled this exception.

Mr. *Russell* in support of the sixth exception. The Registrar has not allowed the expenses incurred by Mr. *Smythies*, or the expenses paid by him to a witness, in a journey to Warwick assizes, for the purpose of attending the trial of the action at law. For these expenses the Registrar has not allowed more than 2*l.* 5*s.*

An exception to the Registrar's certificate on an order for taxation of costs, on the ground that he has not made a sufficient allowance in respect of certain items, must state how much he actually has allowed.

Sir G. ROSE.—The sixth exception alleges, merely in general terms, that the Registrar has not allowed *Smythies* the costs out of pocket paid by him for himself and a witness, in going to and returning from Warwick. It does not state what sum the Registrar actually did allow for these costs. It ought to have stated, that the Registrar had only allowed 2*l.* 5*s.* This exception must therefore be overruled.

Mr. *Russell*, in support of the seventh exception. The Registrar ought not to have paid any regard to the alleged agreement; or, at any rate, he should have stated what the agreement was. He only says, that he has had regard to the alleged agreement, but he does not actually find any agreement.

Where the Registrar certifies, "that he had regard to the alleged agreement;" which agreement had been previously referred to in the petition and affidavits, this is a sufficient finding of the existence of such agreement.

Sir JOHN CROSS.—The order refers to the agreement, and the Registrar was to have regard to the agreement, if

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any. The Registrar also says in his report, that in ascertaining what was due from the bankrupt he had regard to the alleged agreement. He could have no regard to an agreement, which did not exist.

Sir GEORGE ROSE.—The alleged agreement is the agreement alleged in the petition. The seventh exception must therefore be overruled.

The solicitor to the petitioning creditor has an equitable lien on money in his hands belonging to the assignees, for the amount of the petitioning creditor's bill of costs; and although the solicitor might not have a right to set off the amount of such costs in an action at law by the assignees, yet this Court will not annul a fiat sued out by the solicitor against one of the assignees, on the ground that the sum so retained by the solicitor ought to be deducted from the debt on which the fiat was taken out.

Mr. *Swanston*, and Mr. *Chandless*, on the eighth exception being stated, took an objection to the validity of the petitioning creditor's debt, on the ground of its deficiency in amount. The eighth exception admits that 124*l.* 11*s.* 9*d.* is the amount of the debt. But we are prepared to show, that the solicitor had, under *Walker's* bankruptcy, received 32*l.* belonging to the assignees, which he applied, unauthorised by them, to the payment of the bill of costs of the plaintiff's creditors under that fiat up to the choice of assignees. Now, the amount of these costs was due from the petitioning creditor to the solicitor, and not from the assignees, upon whom the solicitor had no legal demand, whatever demand in equity he might have against them. The solicitor could not have maintained an action at law against the assignees for the amount of the petitioning creditor's bill of costs, although he might probably have come to this Court to have it paid. In *Ex parte Benson (a)*, although it was held by two of the judges of this Court, that the solicitor to the petitioning creditor might petition for an order on the assignees to pay him the amount of the petitioning creditor's bill of costs; yet even in that case the chief judge admits, that if the solicitor were to bring an action

(a) 2 M. & A. 582.

against the assignees for the amount of the petitioning creditor's bill of costs, it would be a good defence that there was no contract by the assignees to pay the solicitor, and that the money in their hands was payable to the petitioning creditor. And Sir *J. Cross*, in that case, expressed a very strong opinion, that the solicitor could not even petition for an order on the assignees; and that he had no lien for the amount of the costs on any money in his hands belonging to the assignees. At any rate, the amount of the petitioning creditor's bill of costs is an equitable, and not a legal, demand of the solicitor against the assignees, and would therefore form no part of a debt, on which a fiat in bankruptcy could issue; for this must be strictly a legal, and not an equitable, debt. If the assignees had brought an action against the solicitor for recovery of the 32*l.*, he could not have set off the amount of the petitioning creditor's bill of costs. The amount of the claim of Mr. *Smythies* against the petitioning creditor in *Walker's* bankruptcy, can form no part of a petitioning creditor's debt to support a fiat against *Walker's* assignee.

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Mr. *Russell*, *contrà*. It is not open to the bankrupt to take this exception to the report, in the present stage of the proceedings. By the finding of the report, the solicitor is allowed to retain the 32*l.*, and this finding has never been excepted to by the bankrupt. In the next place, we are not to consider the solicitor's claim for these costs to be governed by the same principle, as if he was suing for them in a Court of Law. We are here in a Court of Equity, on the bankrupt's petition to supersede, for the alleged defect of the petitioning creditor's debt. Now, the Court will never supersede a fiat,

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on the ground that the petitioning creditor must account to the bankrupt for a sum of money which the petitioning creditor had an equitable right to retain in satisfaction of a debt due to himself, and which the bankrupt was in equity and conscience bound to pay. If a solicitor has money in his hands, which he has an equitable right to retain, no Court could, on a question of taxation of costs, compel him to account for the sum which he had so retained. They cannot question in this Court the right of Mr. *Smythies* to retain the 32*l*. In *Phillips v. Dicas* (a), where the same attorney employed by the petitioning creditor had been continued by the assignees, it was held, that he was justified in applying a sum received from the assignees in payment of the bill of costs of the petitioning creditor. Lord *Ellenborough* in that case observes, "the law says, that the first money received by the assignees out of the bankrupt's effects shall be appropriated by them, in exoneration of the costs and charges incurred by the petitioning creditor in prosecuting the commission; therefore, when the defendant received the 100*l*. from the assignees, as their agent and attorney, on account of his bill delivered to them, which included all the items of expenses incurred by the petitioning creditor, he was bound to appropriate it in the same way in which they were bound to do." But we do not admit, that the petitioning creditor's debt in this case is only 124*l*.; we say, that it amounts to 170*l*. and upwards.

Mr. *Swanston*, in reply. The case of *Phillips v. Dicas* does not bear upon this question. The point there decided was, that an attorney, who had included the petitioning creditor's bill of costs in his bill on the assignees, and had received from them a certain sum on account of

(a) 15 *East*, 248.

the bill generally, was bound to appropriate that sum, in the first place, towards the payment of the costs of the petitioning creditor. That case involved merely a question, as to the appropriation of payments, and the right of set-off by the attorney against a debt due from him to the petitioning creditor. The petitioning creditor is bound by the finding of the registrar in his first certificate, in which he finds there was only due to the petitioning creditor the sum of 124*l.* 11*s.* 9*d.*

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Sir JOHN CROSS.—This case does not stand on the dry naked fact, that the petitioning creditor's debt would be only 124*l.* 11*s.* 9*d.* He might possibly recover more in an action at law, which his counsel says it is his intention to bring against the bankrupt; or he may perhaps have other demands against the bankrupt, independently of the amount of the bill of costs. As at present advised, I think the objection to the petitioning creditor's debt, on account of the retention by *Smythies* of the 32*l.* in *Walker's* bankruptcy, is not well founded. With respect to the alleged agreement, it has appeared to me all along, that it would have been more satisfactory, if witnesses had been examined here *vivâ voce*, instead of the Court deriving all its information of the facts from affidavits. Having a regard, however, to all the circumstances of the case, I am prepared to give my judgment on the facts, as they at present stand before the Court. But, as Mr. *Smythies* has pledged himself to bring an action against the bankrupt for the amount of his bill of costs, which action this Court could not prevent his bringing, even if we were now to annul the fiat,—I am disposed to acquiesce in the suggestion of my learned colleague, who thinks the Court had better suspend its judgment, until

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the result of the action is known. If Mr. *Smythies* does not recover in the action, then the bankrupt may apply again to the Court, on his original petition to supersede.

Sir GEORGE ROSE.—With respect to the exception raised by the bankrupt's counsel, on the ground of the sum of 32*l.* not being deducted from the amount of the bill of costs, I think it must be overruled. I am perfectly ready to agree, that if the assignees had brought an action at law against Mr. *Smythies* for the 32*l.*, as for money had and received, he could not have set off in such action the amount of his demand on the petitioning creditor. But it is a very different question, whether this Court will interfere, and supersede the fiat, because he could not strictly plead such set-off at law. By the 6 *Geo.* 4. c. 16. s. 14. the assignees are required to reimburse the petitioning creditor the amount of his bill of costs, out of the first money that is got in under the fiat. It is clear, therefore, that the petitioning creditor has a distinct right to the fund; and this Court has recognized such right to belong also to his solicitor. It is one thing to say, you shall not issue a fiat, except on a strictly legal debt,—and another thing, to supersede a fiat, because the petitioning creditor has appropriated part of a fund on which he had clearly an equitable, though not perhaps strictly a legal, lien. But, whatever our decision may be on the question of supersedeas, we cannot prevent Mr. *Smythies* from bringing an action at law against the bankrupt to recover the amount of his bill. The whole matter, therefore, had better stand over until the determination of that action; when the Court will be better able to pronounce a final decision upon all the questions that have been brought before it.

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Ex parte SMITH.—In the matter of *CLARKE.*

THIS was the petition of three trustees under a marriage settlement, for liberty to prove against the estate of the bankrupt, a co-trustee, for the amount of monies received by the bankrupt's attorney, belonging to the trust estate. The petition also alleged various breaches of trust committed by the bankrupt.

*Serjeants' Inn,
July 9, 1839.*

A petition to prove against a bankrupt trustee alleged various breaches of trust. *Held*, that the Court could only make the common order for the petitioners to go in and make such proof as they were able.

Mr. Swanston, and *Mr. Russell*, in support of the petition. Notwithstanding the breach of trust, we merely ask for the common order.

Mr. Anderdon, contra. In cases of this description, all that is referred to the Commissioners is the quantum due from the bankrupt trustee. But here the petitioner has travelled into charges of breach of trust against the bankrupt, which he denies, or that he had any of the trust-money in his hands at the time of his bankruptcy. We contend, that no order can be made on this petition; but that the proper course is to file a bill.

Sir GEORGE ROSE.—The Court cannot assume any thing either one way or the other, as to the alleged breach of trust, and can only make the common order for liberty to the petitioners to go before the Commissioners, and make such proof as they are able. This Court has no original jurisdiction upon the question of proof; and it is only necessary, in some peculiar cases, for a party to come here to enable him to tender his proof before the Commissioners, who, without the order of this Court for that purpose, would in such cases have

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no power to receive it; and we therefore only remove a difficulty in point of form. The petitioners are entitled to the common order; but, as the assignees are unnecessarily brought here on this petition, they must have their costs.

Ex parte GEORGE RHANDS.—In the matter of
ARTHUR MORRIS.

Serjeants' Inn,
July 16, 1839.

A fiat cannot be amended, after it has been issued; the mistake can only be rectified by issuing a fresh fiat.

THIS was a petition, praying that the petitioner might be at liberty to amend the fiat, by striking out the name of *Christopher Rhands*, who was stated therein to be one of the petitioning creditors,—or that a new fiat might issue, on the petition of the present petitioner, *George Rhands*. It appeared, that the fiat had been issued, on the supposition that the debt was due from the bankrupt to *George Rhands* and *Christopher Rhands* jointly, but it had been since discovered, on the opening of the fiat, that it was not a partnership debt, but a separate debt due to the petitioner alone.

Mr. *Bethell*, in support of the petition, said, that he would be content either with an order to amend, on filing new docket papers,—or for an order to issue another fiat.

The COURT said, that as the fiat had been opened, it could not be amended, but that the petitioner might be at liberty to issue a new fiat, on the usual terms.

Ex parte JOSEPH RHODES.—In the matter of
JOHN RHODES.

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Serjeants' Inn,
July 16 & 17,
1839.

THIS petition of the bankrupt, which had been previously before the Court, on the question of staying the advertisement in the Gazette (a), was now brought on by him on the prayer to annul the fiat, on the ground of the insufficiency, both of the petitioning creditor's debt, and the act of bankruptcy. It appeared, that the petitioning creditor had proceeded under the 1 & 2 Vict. c. 110. s. 8., the act for the abolition of imprisonment for debt, and had filed the following affidavit:—

“In the Court of Bankruptcy.

“*Lancelot Gibson*, of Manchester, in the county of Lancaster, merchant, maketh oath and saith, that *Joseph Rhodes*, of Denton, in the county of Lancaster, merchant, dealer and chapman, is justly and truly indebted to this deponent, and *Joseph Taylor* and *William Taylor*, this deponent's late partners in trade, in the sum of 100*l.* and upwards, upon several bills of exchange, drawn by this deponent and his said late partners upon and accepted by the said *Joseph Rhodes*, and which said bills so accepted have become due, and been returned dishonoured and unpaid. And this deponent further saith,

By 1 & 2 Vict. c. 110. s. 8. if any two or more creditors, being partners, whose debt amounts to 100*l.* or upwards, shall file an affidavit in the Court of Bankruptcy, that such debt is justly due to them, and that the debtor is a trader, and shall cause him to be served personally with a copy of such affidavit, and with a notice in writing requiring immediate payment of the debt, and such trader shall not, within twenty-one days after personal service of such affidavit and notice, pay, or secure, or compound for the debt, or enter into a bond in such sum, with two sufficient sureties, as a Commissioner of the Court of Bank-

(a) See ante, vol. iii. p. 696.

ruptcy shall approve of, such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit and notice, provided a fiat shall issue within two calendar months from the filing of the affidavit. *Held*, that one partner may make the affidavit, without the others joining in it.

The affidavit being for a debt of 100*l.* and upwards, and the notice in respect of a debt of 3612*l.*, the Commissioner ordered the trader to enter into a bond for 200*l.*; upon which the petitioning creditor filed another affidavit for the real debt of 3612*l.*, and delivered a fresh notice; but, no security being given in respect of such last-mentioned affidavit and notice within the twenty-one days, a fiat was issued against the trader. *Quære*: Whether a fiat could legally issue on such second affidavit and notice.

Quære: Whether the solicitor to the petitioning creditor is a competent witness to prove the act of bankruptcy before the Commissioners.

Quære, also, whether the day on which the affidavit and notice are served on the trader, is not to be reckoned one of the twenty-one days.

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that the said *Joseph Rhodes*, at the time of the contracting of the said debt of 100*l.* and upwards, was, and still is, as this deponent verily believes, a trader, within the meaning of the laws now in force concerning bankruptcy."

On the 22d April last, the petitioner was served with a copy of the affidavit above set forth, accompanied with the following notice:—

"We do hereby require and demand of you immediate payment of the debt sworn and deposed to in the affidavit, a copy whereof is hereunto annexed, and which affidavit is filed in Her Majesty's Court of Bankruptcy, such debt being due to us, and amounting to the sum of 361*l.* 5*s.* 10*d.* Dated the 22d day of April, 1839.

"To Mr. *Joseph Rhodes*."

"For *Joseph Taylor*, *William Taylor*, and Self,
" *Lancelot Gibson*."

The petitioner alleged, that he did, as required by the act of parliament in that behalf, within twenty-one days after the service of the above affidavit and notice, enter into a bond in the penal sum of 200*l.* (being the amount fixed by the Commissioner), with two sufficient sureties who were approved of by the Commissioner, to pay such sum as should be recovered in any action for the recovery of the debt alleged to be due by the said affidavit and notice, together with such costs as should be given in the same action; or to render the petitioner to the custody of the gaoler of the Court in which such action was or should or might be brought, according to the practice of such Court, or within such time and in such manner as the said Court, or any judge thereof, should direct, after judgment should have been recovered in

such action. This bond was, on the 14th May last, duly delivered to and left with the agent of Messrs. *Gibson and Taylor*.

On the 29th April last, a similar affidavit was filed; but stating the debt to be 3612*l.* 5*s.* 10*d.*, instead of 100*l.* and upwards.

On the 2d May last, the petitioner was served with a copy of the last-mentioned affidavit, and with another notice as above; which last-mentioned notice, however, purported to be signed as follows:—

“ For *Joseph Taylor and Self*,
“ *William Taylor*.”

Lancelot Gibson, and Messrs. *Taylor*, were not in partnership at the time of making these affidavits, or giving these notices.

A fiat in bankruptcy, dated the 3d June, 1839, was issued against the petitioner, upon the petition of *Lancelot Gibson, Joseph Taylor*, and *William Taylor*; and upon an affidavit of debt of *Lancelot Gibson*, stating, that the petitioner was indebted to *Lancelot Gibson* and his late partners in the sum of 100*l.* and upwards, upon several bills of exchange drawn by the said deponent and his said late partners upon and accepted by the petitioner, which had become due and been returned dishonoured and unpaid. It was alleged, that the debt mentioned in all the affidavits and notices was one and the same debt, and not different debts.

The petitioner, being advised that the second affidavit and notice were irregular, and that such second affidavit for the same debt could not properly be filed, and also that the bond so given by the petitioner after the first affidavit and notice, was a compliance with the requisi-

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tion of the statute, if applicable to the case, did not take any steps to give any further security thereon, but applied to the Court to take the second affidavit off the file; which application, however, was refused.

The petitioner alleged, that he had not committed any act of bankruptcy, unless the not giving further security on the second affidavit and notice was in law an act of bankruptcy, which the petitioner submitted it was not; and more especially for this reason, namely, that the second notice, although purporting to be signed by *William Taylor* for *Joseph Taylor* and himself, was not in fact so signed; and the words "for *Joseph Taylor* and Self," were introduced by some person into the notice, after the same had been signed by *William Taylor* with his own name only, and without any authority from him for that purpose.

It was alleged, that the debt mentioned in the notices, and by the two several affidavits stated to be due to *Lancelot Gibson* and his late partners in trade, was not at the time of swearing the said affidavits, or any of them, due or owing to those parties, or any of them, from the petitioner. But that the debt, if any, founded on the several bills of exchange mentioned in the affidavits, had been, prior to the swearing of the affidavits, and prior to the time of such several bills falling due, assigned over by *Lancelot Gibson* and his late partners to trustees for the Manchester and Liverpool District Banking Company, or some other persons, and that the bills had been indorsed away and delivered over by the drawers thereof, and were then in the hands of, and the money secured thereby was due and owing to, the said District Banking Company, or some other persons, as indorsees and holders thereof.

The petitioner submitted, that the two first-mentioned affidavits, and the notices thereon, were not in conformity with the act of parliament, and that the same did not comply with, and were not expressed in, the terms of the act. That the act required the deponents to state the debt to be justly due and owing to them. That the affidavits and notices were not made or given by the parties required by the act; which requires all the creditors, and not one of several partners, and more *especially* not one of several persons not being in partnership, to whom a debt is due, to make the affidavit, or give the notice, directed by the act; and that the filing of the second affidavit, and the notice thereon, were altogether irregular and improper.

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The petition alleged, that the fiat had been issued for some sinister purpose, and not as the *bonâ fide* fiat of the petitioning creditors. That the bills of exchange, upon which the affidavits of debt were made, were accepted by the petitioner, as a guarantee to *Lancelot Gibson* and his late partners, upon their consigning certain goods to *James Rhodes*, of Montreal, for sale on their behalf. That the goods, and the balance of account and debt in respect thereof, had been, prior to the date of the affidavits and notices, assigned over by *Lancelot Gibson* and his late partners, to some trustees for the said District Banking Company, or some other persons, and did not then or since belong to the petitioning creditors. That there was therefore no sufficient petitioning creditor's debt to support the fiat; and that the petitioner was fully solvent, and had assets sufficient to pay 20s. in the pound to all his creditors, and leave a considerable surplus.

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The fiat had been opened, and the petitioner adjudged a bankrupt.

Mr. *Swanston*, and Mr. *Rogers*, in support of the petition. There cannot be two affidavits, and two notices, for one and the same debt; and the second affidavit is not one on which a fiat can be supported. Another objection to the fiat is, that the act of bankruptcy is proved by the solicitor to the petitioning creditor, who is an interested witness, in regard to his primary right to be paid his costs. [Sir *John Cross*. Is it not in every day's practice, that the attorney for one of the parties in a cause is called to prove some part of the case?] There, the claim of the attorney does not depend upon the result of the verdict. In this case, the claim of the solicitor depends upon the party being adjudged a bankrupt. [Sir *George Rose*. I entertain no doubt as to his incompetency; but I should be unwilling to supersede on that ground alone. Sir *John Cross*. I think the bankrupt is not, in the present proceeding, competent to take the objection to the competency of the witness before the Commissioners (a).] The next objection is, that the bills of exchange, which constitute the debt in this case, are not proved to have been in the hands of the petitioning creditor when the fiat issued. The fact is, that the debt was not the debt of the petitioning creditor, but had been assigned by him to the Manchester and Liverpool District Banking Company. [Sir *John Cross*. You

(a) See *Ex parte Lane*, 1 Mont. Dig. 89, where it was held, that an objection to the competency of a witness, if it be not taken before the Commissioners prior to the adjudication, cannot afterwards be urged as an objection to the proceedings under the commission.

have a better case, if you prove that the bills of exchange on which the debt is founded, were indorsed to the bank by the petitioning creditor before the docket was struck. Although the obligee of a bond may assign the debt, does not the legal interest remain with him, and could not the assignee of the bond put it into the hands of the obligee to bring an action against the obligor?] In bankruptcy, the assignee of the bond must join with the obligee in swearing to the debt, when he comes to prove it under a fiat; and therefore the same rule would prevail in swearing an affidavit, for the purpose of suing out a fiat on the debt. It cannot be contradicted, that the bills were indorsed to the banking company by the petitioning creditor, before he struck the docket. The bills, therefore, being indorsed away, they are not proveable by the petitioning creditor, until he has paid them to the present holders. The affidavit of debt also is defective, in point of form; it is made by one person swearing to a debt, as owing to himself and others, who were not partners at the time of the making of the affidavit; the partnership having been then dissolved. [Sir *George Rose*. They were partners when the debt was contracted.] It has been decided by the Vice-Chancellor, under the Bankrupt Act, that a commission could not be issued against persons, as partners, who had dissolved their partnership; and the same reason seems to hold against the validity of a commission issued by persons, as partners, after their partnership has been dissolved. Another objection is, that the act of parliament 1 & 2 *Vict.* c. 110. s. 8., requires the affidavit to be made by *all* the partners; the words being "if two or more creditors, being partners, whose debt shall amount to 100*l.* or upwards,"

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shall file an affidavit. Here the affidavit is made by *Gibson* alone, without the two *Taylors* joining in it; a valid objection, if they continued partners; but, *a fortiori*, it must prevail, where the partnership no longer exists. [Sir *John Cross*. The words of the act are, "shall file an affidavit." May not several partners file an affidavit made by one?] The remaining objection is, that the affidavit states that the bankrupt is "*indebted*" to the deponent, instead of following the words of the act, namely, that "such debt was justly due" to him. This, therefore, is a departure from the power prescribed by the act of parliament.

Mr. *Temple*, Mr. *Bagshaw*, and Mr. *Swann*, for the petitioning creditor. The first affidavit was filed on the 22d April, stating that the bankrupt was indebted to the petitioning creditor and his late partners in the sum of 100*l.* and upwards. The bankrupt gave notice that he should attend before the Commissioner, and give the security required by the act; but he did not attend until the 13th May, which was beyond the twenty-one days limited by the act of parliament. The bond, also, which was then accepted by the Commissioner as security for the debt, was not stamped until the 14th May. No valid bond, therefore, was in existence at the expiration of the twenty-one days. It was not then a complete security, but a mere paper-writing, which was of no effect until it was stamped. The bankrupt, therefore, having given no valid security for the debt within the twenty-one days, committed an act of bankruptcy within the meaning of the statute. [Sir *J. Cross*. When the bond was stamped, the stamp related back to the time of the execution of the bond.] If the Court should hold

this not to be an act of bankruptcy, we rely on the second affidavit of the 29th April, which we contend is for a different debt; the first affidavit being only for 100*l.*, and the second for 361*2l.* Why are we not at liberty to file an affidavit for a further debt, when we find the first affidavit does not cover the whole debt?

With respect to the objection to the competency of the solicitor to prove the act of bankruptcy, we say, that he would be a competent witness in a court of law. The solicitor has no lien on the proceedings; and though he may have a lien on the fund, yet he is allowed to give evidence under such circumstances in a Court of Equity. There is, at least, no decision to the contrary. But the costs are not given by the act to the solicitor, but to the petitioning creditor. In *Ex parte Harcourt* (a) it was held, that in support of the adjudication of bankruptcy on a commission issued against a member of parliament, the creditor himself is a good witness to prove the preliminary proceedings.

Sir JOHN CROSS (addressing Mr. *Swanston*).—You contend, that the two affidavits are for one and the same debt; but I do not apprehend, that we are bound so to consider them. We must take the first affidavit to be for 100*l.*; for the expression “and upwards” must be rejected as mere surplusage. The petitioning creditors wish to have security for a further debt, and make a second affidavit for that purpose: but the Commissioner says, that the second affidavit was not judicially before him. The entire debt, however, is on several bills of exchange, on each of which the petitioning creditors have a separate right of action. Such a proceeding certainly

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(a) 2 Rose, 203.

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appears vexatious; but I am not prepared to say, that they would not be entitled to sue on each bill separately.

Sir GEORGE ROSE.—Before this case proceeds further, I wish to press on the parties the necessity of sending the question to be tried by an action at law; being still of opinion, that the main objection to the fiat is, that the act of bankruptcy has been proved by the solicitor to the petitioning creditor. In *Ex parte Harcourt*, it was a matter of necessity there, that the act of bankruptcy, in some of its circumstances, should be proved by a creditor; but Lord *Eldon* there said, that although you must admit the creditor to prove what he alone could prove, yet he was not to be admitted to prove what could be established by the evidence of others. There can be no doubt that, as a general rule, it is contrary to all practice to permit a creditor to prove the requisites to support the fiat; although it is difficult to find a principle for the rule; as the interest of the creditor in upholding the fiat is balanced by the deprivation of his right to sue the bankrupt at law. But the solicitor is ten times more interested in upholding a fiat than a creditor, because there is nothing to balance his interest. The creditor has only the chance of a dividend; but the solicitor is to be reimbursed his costs out of the first money that is got in under the fiat. For however, in theory, the solicitor's claim may be against the petitioning creditor, yet it is well known that, in practice, he takes his costs out of the fund in the hands of the assignees, without any application to the petitioning creditor. As the bankrupt states it to be his intention to proceed at law, I think we are bound to allow him to adopt that course, before we finally dispose of his pe-

tion; putting him however on terms to proceed *instanter*. I admit, that the petitioning creditors were legally qualified to sue on these bills.

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Mr. *Swanston*, in reply. Both affidavits were for the same debt. The solicitor to the petitioning creditor swears, that it was his intention to proceed for the debt of 3612*l.*, and the notice expressly refers to that debt. The statute says, that it must be *the debt* of the creditor, not one of several debts. To what debt did the affidavit of the creditor refer, when he swore that the bankrupt was indebted to him in the sum of 100*l.* and upwards? Why, to the debt of the creditor. As to the validity of the debt, the legal title was in Mr. *Redfern*, as the holder of the bills; and there must be a legal debt, to allow a party to be petitioning creditor. Upon this principle, a trustee must join with his *cestui que trust* in issuing a fiat; *Ex parte Gray (a)*. The requisites of the statute have not been complied with.

Sir JOHN CROSS.—This is a new question arising on the construction of a new act of parliament. As the point has not been hitherto decided, I should wish to take a little time before I pronounce my final opinion. But in the mean time I cannot help observing, that this Court is the proper tribunal to try the question, without driving the parties to an action at law.

The case being called on again this day,

July 19.

Sir JOHN CROSS observed that, in arguing this case, great stress had been laid on the rule, that a man cannot be held to bail twice for the same debt. But, in the case

(a) 4 Deac. & C. 778.

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of *Bates v. Barry* (a), a defendant was held to bail a second time for the same cause of action, after the plaintiff had discontinued the first writ, by reason of a mistake; the defendant having been arrested in an action on the case, when the proceeding ought to have been in covenant. Upon the defendant's application for his discharge, on entering a common appearance, the Court said, that as it was a mere mistake, and not done with any intent to oppress or harass the defendant, the application must be refused. In the present case, the first affidavit charged the debt as 100*l.* and upwards, while the notice claimed the entire debt due; then the second affidavit, stating the whole amount of the debt, was filed, and a fresh notice was given. Now, I do not find, that the bankrupt would in the least degree be prejudiced by the second proceeding; for he had both sets of documents in his hands, when he gave the security for the 100*l.* But I give no opinion on the case at present.

Sir GEORGE ROSE.—There is no question, but that a plaintiff could formerly hold a defendant to bail a second time, in certain cases; but then he must have discontinued his first proceeding (b). In order to clear the present case of that difficulty, the first affidavit and notice, and the bond, should have been swept away entirely.

Mr. Temple.—We waive the bond in every possible way; we repudiate it altogether.

Sir J. CROSS.—That certainly puts the case in an en-

(a) 2 Wils. 381.

(b) By the new rules of practice, Hil. T. 2 Will. 4. rule 7, the defendant cannot now be arrested a second time, after non pros., nonsuit, or discontinuance, without an order of a judge.

tirely different point of view. It must stand over for judgment.

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The case was mentioned again this day.

July 20.

Mr. *Temple* said, that he would prefer the judgment of the Court, to the proceeding of an action at law.

Sir JOHN CROSS.—I have some difficulty, as to the point of the act of bankruptcy. In *Glassington v. Rawlins* (a), it was determined that where the act of bankruptcy consisted in lying in prison a certain period after being arrested, the day of the arrest was to be included in the calculation of the time. Now, here the affidavit and notice were served on the bankrupt on the 22nd of April 1839, and the bond was given on the 13th of May; so that if you are to include the day of the notice, the twenty-one days limited by the act of parliament would have expired before the day on which the bond was given, and the act of bankruptcy would have been then complete.

The COURT, at its rising, finally ordered the

Petition to be dismissed.

(a) 3 East, 407.

In the matter of SAMUEL H. SALE and JAMES ASHLEY.

MR. SWANSTON applied for leave to amend the docket papers, by correcting a mistake in the name of

Serjeants' Inn,
July 20, 1839.

One of two partners, against whom a docket was struck, after

being rightly named in two previous parts of the affidavits, was misnamed "Jacob," instead of "James." *Quere*, Whether such an error was material. But time was given to amend, without prejudice to the rights of any other creditors.

1839. one of the parties against whom the docket was struck,
 ~~~~~ who was called in one place *Jacob Ashley*, instead of  
 In re      *James Ashley*. It appeared that another docket had  
 SALE      been struck by another party.  
 and another.

The COURT quashed the order, but without prejudice to the rights of the other party.

Mr. *Anderdon*, on behalf of the other creditors, then said, that he had been just instructed to oppose the application.

Mr. *Swanston* objected to any interference of the other creditors, except by a regular application on affidavit and notice. The affidavit of the party, for whom I apply, states the name of "*James*" right in two instances, and then says, "that no offer has been made by the said *S. H. Sale* and *Jacob Ashley*, to pay &c."

Sir JOHN CROSS doubted whether such an error was material, it appearing to be a mere clerical inaccuracy, without requiring explanation on the face of the papers themselves.

*Serjeants' Inn,*  
*July 20th.*

Where the petitioning creditor's debt was on a bill of exchange, which was not in his hands when the fiat was sued out, the debt of another creditor was substituted, at the costs of the petitioning creditor.

Ex parte HENRY CATTLEY.—In the matter of GEORGE GOODWIN.

THIS was the petition of a creditor who had proved under the fiat, to have his debt substituted for that of the petitioning creditor. It appeared, that the petitioning creditor's debt was on a bill of exchange, which on the 4th December 1836 he had paid over and indorsed to the Yorkshire District Bank, in whose possession it re-



mained until after the issuing of the fiat, which was dated the 28th February 1837; so that the bill, on which the fiat was sued out, was not then in the hands of the petitioning creditor. The petitioner stated, that his own debt was incurred not anterior to that of the petitioning creditor, and prayed that it might be substituted, at the costs of the petitioning creditor.

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*Ex parte*  
CATTLEY.

Mr. *Anderdon* appeared in support of the petition.

Mr. *Jervis* for the petitioning creditor.

The COURT made the order as prayed, saying, that the petitioning creditor must take all the consequences of his mistake.

ORDER made, with costs to be paid by the petitioning creditor.

*Ex parte* THOMAS WHITEY.—In the matter of THOMAS WHITEY.

*Serjeants' Inn*  
*Hall,*  
20th July.

THIS was the petition of the bankrupt to annul the fiat, on the following grounds, stated by him in his petition.

The fiat was sued out under the provisions of the 1 & 2 Vict. c. 110. s. 8. On the 27th April 1839 the petitioning creditor filed his affidavit in the Court of Bankruptcy, stating that the petitioner was then a trader, and was indebted to him in the sum of 517*l.* 11*s.* 2*d.*; and on the above-named day he served a copy of such affidavit upon the bankrupt, together with notice in writing re-

The 1 & 2 Vict. c. 110, s. 8, enacts, that if a trader, after an affidavit filed, and proceedings taken against him by his creditor, omits to enter into a bond, &c. he shall be deemed to have committed an act of bankruptcy, provided a fiat shall issue against him within two

calendar months from the filing of the affidavit:—*Held*, that the day of filing the affidavit is to be reckoned the first day of the two months.

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Ex parte  
WHITBY.

quiring the petitioner immediately to pay him such alleged debt, together with further interest on the debt to the day of payment. The petitioner not having paid or compounded for such alleged debt, nor having executed any bond as by law required, on the 27th June a fiat was issued on the petition of *Benjamin Webb*; but, inasmuch as it was not issued within two calendar months from the filing of the affidavit, the petitioner contended that he was entitled to have the fiat superseded.

It appeared from the affidavits in support of, and in opposition to, the petition, that the bankrupt had in 1814 agreed to hire several waggons of the petitioning creditor at an annual rent, by which agreement the bankrupt was to keep them in repair, and the agreement was to be determined by him, after giving three months' notice. The bankrupt, pursuant to notice given to the petitioning creditor, returned the waggons to him on the 24th June 1839; but the petitioning creditor contended, that the waggons were sent away by the bankrupt, to avoid the effects of an execution at the suit of the petitioning creditor, and with intent that the latter should take them in part payment of his debt. But the material question at issue was, how the period of two months was to be reckoned under the 1 & 2 *Vict.* c. 110. s. 8., by which it is enacted, that if a creditor, whose debt shall amount to 100*l.* or upwards, shall file an affidavit in the Court of Bankruptcy, that such debt is due to him, and that his debtor is a trader, and shall cause him to be served personally with a copy of the affidavit, and with a notice in writing requiring immediate payment of such debt; and if such trader shall not within twenty-one days after personal service of the affidavit and notice pay

such debt, or secure or compound for the same to the satisfaction of the creditor, or enter into a bond in such sum, and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, every such trader shall be deemed to have committed an act of bankruptcy, on the twenty-second day after service of the affidavit and notice, *provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of the affidavit.*

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Ex parte  
WHITBY.

Mr. *Swanston*, in support of the petition. As the affidavit was filed on the 27th of April, and the fiat was not issued until the 27th of June, this was not *within* the two months from the filing of the affidavit; the fiat therefore cannot be supported. Where the computation of time is to be from an act done, the day when such act is done is to be included in the reckoning; *Ex parte Farquhar* (a). Consequently, the 27th of April must in this case be considered as the first day, and the 26th of June the last, in reckoning the two months; so that the 27th of June would be a day beyond the two months. The same point was determined in *Godson v. Sanctuary* (b), where the sheriff seized the goods of a trader on the 13th of August, and a commission issued against him on the 13th of October; and it was there decided, that more than two calendar months had elapsed between the execution and the issuing of the commission; Lord *Denman* in his judgment expressly recognizing the decision in *Ex parte Farquhar*.

Mr. *Bethell*, for the petitioning creditor. The wag-gons and carts must be considered to be the property of

(a) Mont. & M. 7.

(b) 4 B. & Adol. 255.

1839.

Ex parte  
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the bankrupt ; they were sent away by him to avoid an execution, without the knowledge of the petitioning creditor, and to the intent that the latter might take them in part payment of his debt. [Sir *John Cross*. How can you call this an act of bankruptcy, when what was done by the bankrupt was under the pressure of proceedings taken against him by the petitioning creditor ?]

With respect to the computation of the two months,—it appears from the affidavit of the petitioning creditor, that the affidavit required by the statute was filed on the 27th of April between one and two o'clock, and that the fiat was signed on the 27th of June between one and two o'clock. Now, admitting the day of filing the affidavit to be reckoned as the first day of the two months, the issuing of the fiat will be, by the fraction of a day, within the period of the two months ; and, in the case already cited of *Ex parte Farquhar*, it seems that for some purposes the Court will notice the fraction of a day<sup>(a)</sup>. But as the fiat bears date, generally, on the 27th of June, the presumption in law is, that it was issued the first hour of that day ; and that would be some hours within the two calendar months, reckoning from between one and two o'clock of the 27th of April. There is a difference between the provision of the statute as to the period relating to the commission of the act of bankruptcy, and that relating to the issuing of the fiat ; in the first case, the time is reckoned after *service* of the affidavit ; in the latter, from the *filing* of the affidavit. In reckoning one day inclusive, and the other exclusive, you reckon from the last hour of the first day ; and when the statute says, “ within two calendar months from the filing of the affidavit,” it means, *from and after* the day on which the

(a) And see *Thomas v. Desanges*, 2 B. & Ald. 584.

act was done ; so that the 28th of April will be the first day of the two months. If this mode of computation is correct, the issuing of the fiat, which was on the 27th of June, was within two calendar months from the filing of the affidavit.

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Sir JOHN CROSS.—In reckoning any given period of time from the time when an act of bankruptcy is committed, it must inevitably follow that you take into consideration the fraction of a day. The first act of bankruptcy set up in this case, of the alleged fraudulent removal of goods to avoid an execution, appears to me wholly unsustainable, and nothing but an after-thought. I shall therefore direct my attention to the consideration of the second act of bankruptcy relied on, namely, the not giving the security required by the statute within twenty-one days after formal service of the affidavit. There is no doubt that in reckoning a period of time from an act done, the general rule is, that the day on which the act is done is to be reckoned the first day. This is sufficiently apparent, as well from the cases cited in the argument, as from *The King v. Adderley* (a), *Castle v. Burdit* (b), and *Glassington v. Rawlins* (c), the last of which is very applicable to the present case. It was there decided, that where time is to be computed from an act done, the day on which such act is done is to be included in the computation ; and that therefore where the act of 21 Jac. 1. c. 19. s. 2., enacted, that a trader lying in prison two months after an arrest for debt should be adjudged a bankrupt, that included the day of the arrest. It is very true, that in *Lester v. Garland* (d), Sir

(a) Doug. 463.

(b) 3 T. R. 623.

(c) 3 East, 407.

(d) 15 Ves. 247.

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*William Grant* held that the general rule was not applicable to all cases; and that in *Pellew v. The Hundred of Wonford* (a), which was an action against the Hundred on the 9 Geo. 1. c. 22., to recover damages for the injury done to premises maliciously set on fire, it was held, that the two days allowed by the statute for giving notice of the offence were to be reckoned exclusive of the day on which the fire happened; for if that were not so, the party would only have had one day to give the required notice. The last two cases, however, are only exceptions to the general rule, which, as appears to me, ought to govern this case.

Sir GEORGE ROSE concurred.

ORDERED, that the fiat should be annulled.

(a) 9 B. & C. 134; and see *Hardy v. Ryle*, 9 B. & C. 603.

Ex parte REUBEN TERREWEST.—In the matter of  
JOHN POYNTER.

Cor. Lord  
Chancellor,  
Nov. 4, 1839.

The petitioner lent the bankrupt 1600*l.* on his promissory note, payable three months after date, renewable for the same period at the option of the bankrupt; but so as not to exceed the period

THIS was an appeal of the petitioner to the Lord Chancellor from a decision of the Court of Review (a), on the following

SPECIAL CASE :

The appellant claims to be a creditor of the bankrupt, for the sum of 1137*l.* 1*s.* 8*d.*, being the balance of prin-

(a) See *ante*, 3 Deac. 590.

of eighteen months in the whole; the bankrupt undertaking to pay 7½ per cent. interest, and 3*l.* per cent. insurance. The note was renewed four times successively; and on each renewal the same rate was deducted for interest and insurance. *Held*, that this transaction was protected by the 3 & 4 Will. 4. c. 98. s. 7. which allows any interest to be taken on a bill or note not having more than three months to run; and was consequently not usurious. Reversing the decision of Court of Review, 3 Deac. 590.

cial and interest claimed to remain due at the date of the fiat, upon the following promissory note of the bankrupt (that is to say) :

" £1600. London, 26th August 1835.

" Three months after date I promise to pay Mr. *R. Terrewest*, or order, 1600*l.* for value received.

" *John Poynton*,

92, Guilford Street, Russell Square.

" Mr. *R. Terrewest*, Lincoln's Inn Fields."

The appellant presented his petition, claiming a lien in respect of his alleged debt, on a sum of 262*l.* therein mentioned, praying relief in respect of the application of the said sum of 262*l.*, and that he might be at liberty to go before the Commissioner and prove for the balance which might remain due to him of the said sum of 1137*l.* 1*s.* 8*d.*, after payment of so much as should be directed to be paid to him out of the said sum of 262*l.*

The Court, having fully heard and considered the proofs and allegations of the parties, found that in fact the note in question was given as security for a pre-existing debt, and that no money was actually advanced thereon ; that the debt mentioned in the note was contracted for so much money lent long before, for an indefinite time, not exceeding eighteen months, in consideration of the borrower agreeing to pay interest at the rate of 10*l.* per cent. per annum, and to give a series of such notes, renewed every three months ; and that the note in question was the last of a series of five, on all of which the stipulated rate of interest was successively paid ; and that such notes were required by the lender, merely, as a shift and contrivance to evade the usury laws. And the Court did thereupon adjudge and decree, that the said contract was usurious and void,

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being contrary to the statutes in that case made and provided, and not authorized by the act 3 & 4 Will. 4, c. 98.; and that the said petition should be dismissed with costs.

The appellant insists, that the said judgment and decree is erroneous in matter of law.

Certified by me,

*J. Cross, J.*

Mr. Wigram, and Mr. Anderdon, in support of the appeal. The question raised on this appeal is, whether the transaction detailed in the special case was a *bonâ fide* discount of promissory notes, or a mere loan for eighteen months, under colour of a discount of notes; whether, in short, the notes were introduced into the case, as a mere shift and contrivance to evade the laws against usury. If the transaction was a *bonâ fide* discount of notes, the case will then fall within the provisions of the 3 & 4 Will. 4. c. 98. s. 7., which enacts, "That no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, indorsing, or signing any such bill or note, or tending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or



law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding." There can be no doubt, that the transaction was perfectly legal on the first note. Then, why should it not be so on the second and subsequent notes, which were mere renewals of the first? Suppose the maker of the first note, when it became due, had brought to the holder the amount secured by it, and also the second note to be discounted, and the money had been then handed back to him by the holder, deducting the amount of the discount on the second note,—and the same transaction had taken place on each subsequent note,—no one can doubt that the transaction would have been protected by the statute. Then, what difference can it make, in principle, that the useless ceremony of paying the money and handing it over again, was omitted in the present case? In *Holt v. Miers* (a), the Court of Exchequer decided a much stronger case than this to be within the protection of the 3 & 4 Will. 4. c. 98. s. 7. In that case, A. agreed with B. to lend him 200*l.*, at the rate of 1*s.* in the pound per month, to be secured as follows; whenever any portion of the money should be advanced, the borrower was to give a promissory note, payable one month after date, to be renewed as often as it should fall due; and for each renewal 1*s.* in the pound was to be paid by way of discount; and it was held, that the notes so given were protected by the statute. In that case, the interest charged amounted to no less than 60*l.* per cent. per annum; in the present case, it is only 10*l.* per cent. per ann. The case of *Ex parte Knight* (b) may be also referred to, as showing the liberal construc-

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(a) 5 Mees. & W. 168.

(b) 1 Deac. 459.

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tion put by the Court of Review on the provisions of the statute; for in the last-mentioned case, the loan of money was secured by the deposit of goods, as well as by bills of exchange. From the subsequent act of 7 *Will.* 4. and 1 *Vict.* c. 80., we may reasonably infer, that the legislature thought that the provisions of the previous statute should be extended, instead of being narrowed; for the last statute declares, that bills and notes not having more than *twelve months* to run, shall not be liable to the usury laws. The note, on which the petitioner claims in the present case, is only a renewal of the note originally given by him. If the first note was protected by the statute, we contend that the last note was equally within its provisions; and that the judgment of the Court of Review ought therefore to be reversed.

Mr. *Swanston*, and Mr. *J. Russell*, for the respondents. The statement in the special case is decisive of the present question; for it is there found as a matter of fact, and not of law, that the debt mentioned in the note was contracted for money lent for an indefinite time, not exceeding eighteen months. Now, the statute confines the exceptions to bills or notes payable at or within three months. But in this case, the attempt was made, by the introduction of notes, to bring the transaction within the statute; and was nothing less than a contrivance or shift resorted to by the lender of the money, to avoid the penalties of usury. The transaction was a mere loan of money, and not such a dealing with bills or notes as the statute contemplated. The words of the statute are, that no bill or note payable within three months, &c. shall by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest in

discounting, negotiating, or transferring the same, be void on the ground of usury. The statute is confined to the discounting, negotiating, or transferring bills of exchange or promissory notes. Now in this case, the loan of money being before the bill of exchange existed, the transaction cannot be brought within the exception of the statute. [The *Lord Chancellor*. There is nothing that I perceive in the statute to limit its operation to bills or notes only, where the money is advanced at the time of giving the bill or note. There are three distinct divisions in the 7th section of the act, by which three distinct transactions, illegal before, are rendered legal; but in none of them is it expressed, that the loan of money should be contemporaneous with the bill or note. The first division relates to the bill or note itself; the next to the liability of any party to any bill or note; and the next division refers to persons dealing with such bills or notes. The words "such bills or notes," do not occur in the clause relating to the liability of the party.] We contend, that the *agreement* mentioned in the act is confined to *discounting* and *negotiating* bills or notes, and does not extend to renewed bills. The enactment of the subsequent statute, 7 *Will.* 4. and 1 *Vict.* c. 80., which extends the time for the bills to run, shows also that the first statute referred to a loan connected with discounting or negotiating a bill. [The *Lord Chancellor*. Do you contend, that the bill must be pre-existing to the debt? Suppose *A.* lends *B.* a sum of money at six per cent. interest, on the security of a bill of exchange payable at three months; that would be a loan of money on a bill, not the discount of a bill. The question is, whether such a bill cannot be renewed within the provisions of the statute. If *A.* says to *B.* "Forbear to

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press the payment of a bill overdue, and *B.* declines, unless *A.* will give him a fresh bill at increased interest, would such a transaction be illegal ?] We submit that it would. In *Berrington v. Collis* (a), where a loan of money at more than five per cent. interest was effected upon the security of the deposit of a lease, a warrant of attorney, and a promissory note, it was held not protected by the statute, as not being a loan really and *bonâ fide* made upon the security of the promissory note. In the present case the loan itself was effected on the original note, and not on the note now in question, which was the last of a series of five notes. As to the case of *Holt v. Miers* (b) in the Exchequer, the decision of the Court is, no doubt, entitled to respect ; but it is far from being a satisfactory decision ; there is something inexplicable about Lord *Abinger's* judgment ; and though Mr. Baron *Parke* considers that no bills payable at three months can be usurious, yet he approves of the decision in *Berrington v. Collis* (a), which invalidates a bill, where a lease was deposited and a warrant of attorney given with the bill. [The Lord Chancellor. Mr. Baron *Parke* said, that the case in the Common Pleas was decided on special facts, which did not apply to the case then before the Court. One of the questions in *Berrington v. Collis* (a) was, whether the loan was on the promissory note, or on the warrant of attorney ; if the warrant of attorney was given before the bill, then the interest was illegal ; but if the warrant of attorney had been given since the bill, then the interest would have been legal.] We have these facts established in the present case, that the note was given for an antecedent debt, and that the loan was

(a) 5 Bing. N. C. 332.

(b) 5 Mees. &amp; W. 568.

for a period of ten months. In *Cowie v. Harris* (a), which was a case on the Pawnbrokers' Act, where the pawnbroker received a parcel of goods on one day, and on that and several subsequent days he advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbroker's interest of 3*d.* in the pound per month on those sums,—Lord *Ellenborough* put it to the jury, whether this was really one transaction, and a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void; or, whether the advances were really distinct. So, in the present case, if the original transaction was a contract for the loan of 1600*l.* for eighteen months, and the first bill was given in pursuance of that contract, it must be held to be void, as a contrivance to obtain more than legal interest on the money agreed to be lent. Suppose there had been a contract for a loan of 160*l.* for one year at 12*l.* per cent., and one month before the expiration of the year, a bill had been given to secure the 100*l.* and interest at that rate, it would be a bold thing to say, that such a bill was within the provisions of the act. We deny in this case, that there was any loan of money on a promissory note, but a loan of money for an indefinite period, at the rate of ten per cent. The case in the Common Pleas decided, that if the bill or note was not the *sole security* given, but accompanied with any other security, then the transaction was not protected; and the same reasoning applies to any contract for a loan of money, which is not confined to a bill or note made payable at or within three months after its date.

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(a) Mood. &amp; M. 141.

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Mr. *Wigram*, in reply, was stopped by the Court.

LORD COTTENHAM, C.—I entertain no doubt upon this question. The grounds of the decision of the Court below are shown in the special case, which states, “that the note in question was given as a security for a pre-existing debt, and that no money was actually advanced thereon; and that the debt mentioned in the note was contracted for so much money lent long before, for an indefinite time, not exceeding eighteen months, in consideration of the borrower agreeing to pay interest at the rate of 10*l.* per cent. per annum, and to give a series of such notes, renewed every three months; and that the note in question was the last of a series of five, on all of which the stipulated rate of interest was successively paid.” Now, taking all that statement together, what does it amount to? There is no contract for a loan of money beyond the three months, nor any loan independent of the notes; nor do I find any thing to prevent the lender from suing upon the first and every other note, when they respectively arrived at maturity. At most, a mere expectation is held out, not to demand payment at the end of the first three months, and at the same time the lender gives notice that the borrower must not expect indulgence by renewal beyond the eighteen months. It cannot be assumed, therefore, that this is not a contract on a bill of exchange or promissory note; for the transaction is altogether connected with promissory notes.

The judgment of the Court of Review, as reported, differs materially from the statement in the special case; for in the one, the renewals of the notes are to be at the option of the borrower; while, in the latter, nothing is

said as to the party who is to exercise that option. Dealing, as I am bound to do, with the special case only, I find there is no contract whatever binding on the lender of the money to extend the time for payment beyond three months. The first note is unpaid when the three months expire, and then another note is given for three months; and in like manner that and the subsequent notes are respectively renewed for three months, as they severally fall due. Why should not this transaction be protected by the statute? The statute provides that no bill of exchange, or promissory note, made payable at or within three months, or not having more than three months to run, shall, by reason of any interest taken thereon or received thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill or note be affected by reason of any statute in force for the prevention of usury, nor shall any person drawing &c. any such bill or note, or lending or advancing money, or taking more than the then present rate of legal interest, namely, 5l. per cent., for the loan of money on any such bill or note, be subject to any penalty or forfeiture. Here are distinct provisions applicable to distinct transactions. The statute first legalizes bills and notes, which otherwise would be void in their concoction. It next provides for transactions with bills and notes originally good, but which would themselves be rendered inoperative and void, in the hands of the holders of them, by reason of their having taken more than 5l. per cent. on the discounting, negotiating, or transferring of the same; and then, to prevent any misconception, it provides that the liability of any party to *any* bill or note shall not be affected by any law for the prevention of usury. But

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suppose it were read any *such* bill (a) or note, the present case would still fall within the statute. The latter part of the clause was necessary to protect the parties from the penalties imposed by the old laws of usury; for, though a bill or note might be rendered legal, the penalties attaching under the present usury laws might still be recoverable.

The judges of the Court of Review seem to have thought, that the statute only extends to protect bills and notes given when the loan is first granted, and that the mere renewal of a bill or note does not fall within the exemption from usury. But I cannot see why that should be so. Suppose a party is not able to pay a debt, and agrees to give a note for three months at 10*l.* per cent. Why should not that be legal? The statute seems to provide for such a case. It is this class of persons, who are most likely to need the renewal of bills, and whom, in my opinion, the legislature intended to benefit and protect; and there is nothing in the clause, which will bear the interpretation that renewals are excluded. Of course, the statute only extends to protect *bonâ fide* transactions; but all such cases as the present appear to me to fall within its protection. I am bound by the special case; and looking at that case, I see nothing which indicates *mala fides*. There, the original loan was on a note payable at three months; and when that fell due, another was given payable also at three months; and so on until a fifth note was given; the price of forbearance being an undertaking on the part of the borrower to pay interest at 10*l.* per cent. If the transaction was legal for the first bill, it appears to me to be equally legal for the second, and the fifth. The renewals, I conceive, make

(a) See *Vallance v. Liddell*, 6 Adol. & E. 432.



no difference; else, all that would have been necessary would have been for the parties to go through the mere form of handing the money over on each renewal, and then receiving it back again; a ceremony, which it would be absurd to think was required by the legislature. I cannot construe the clause, as confined to the transaction of discounting and transferring bills and notes. That is an entirely distinct transaction from the two others mentioned in the statute. It is not necessary in this case to go so far as in *Holt v. Miers*, which turned on the facts stated in the plea, and where the contract was for a loan, so long as the defendant should pay the usurious interest.

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As to the statement in the special case "that the notes were required by the lender merely as a shift and contrivance to evade the usury laws,"—I confess I cannot view the transaction in that light. In one sense, however, it certainly was so; for it was a shift and contrivance to bring it within the exemptions from those laws, as contained in the 3 & 4 *Will.* 4. c. 98.; and the statute itself, as it appears to me, enables the parties to adopt such contrivance. It was not a shift and contrivance, therefore, to evade the laws of the *land*. All that I can declare is, that the note in question is a good note, and not affected by the laws of usury.

The ORDER was, that the decision of the Court of Review should be reversed; and that it should be referred back to that Court to make consequential directions, with a declaration that the petitioner had a good debt not affected by usury; and that the assignees should refund to the petitioner all the costs he had paid to them under the former Order.

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Note.—The case came again before the Court of Review, on the 22nd November and 22nd January following, on the question of the equitable mortgage, and as to the right of costs; when the common Order was made, as in the case of an equitable mortgage without any memorandum in writing.

Ex parte JOHN CLARE and EDWARD BROWNE.—In the matter of JOHN GLOVER.

Wednesday,
November 7th.

Although under the 42d section of the 1 & 2 Will. 4., a fiat cannot be annulled by reason only of its being concerted between the petitioning creditor and the bankrupt, yet the Court may have regard to the fact of concert, in conjunction with the other circumstances of the case, which shew that the fiat was not issued for a *bonâ fide* purpose.

A fiat may be lawfully issued to defeat an execution, but it must not be the fiat of the bankrupt.

THIS was the petition of execution creditors to annul the fiat, on the ground that it was virtually the fiat of the bankrupt, and was issued not for the *bonâ fide* purpose of distributing his effects among his creditors, but in order to set aside the execution.

It appeared, that the petitioner sued out a *fiery facias* against the bankrupt for the sum of 62*l.* 14*s.* 8*d.*, under which the sheriff levied on the 29th June. On the same day Mr. *Passman*, the bankrupt's attorney, applied to the attorney for the petitioners, and requested him, on behalf of the petitioners, to accept an assignment of the goods and stock in trade of the bankrupt, instead of the petitioner levying under the execution; upon a suggestion, that by such means some benefit might be obtained for the goodwill of the bankrupt's business. To this proposal, however, the attorney for the petitioners objected, on the ground that such an assignment would be an act of bankruptcy, and that some other creditor might take advantage of it and make him a bankrupt; upon which Mr. *Passman* observed, that no other creditor could make him a bankrupt, as none of their debts was

large enough for that purpose. The attorney for the petitioners, however, said that the execution must take its course. On the 4th July following Mr. *Passman* wrote to the petitioners' attorney, informing him that a docket was struck against the bankrupt, and that the fiat would be proceeded with at once, unless his clients chose to come in rateably with the other creditors. To this letter the attorney for the petitioners returned a verbal answer, that he would not agree to a composition, and that he should dispute the fiat, if it were proceeded with. On the 10th July the petitioners' attorney received a note from Mr. *Passman*, announcing that a fiat had been issued and was then in prosecution; which notice was signed by Mr. *Passman*, as the solicitor to the fiat. On the same day the sheriff sold the goods levied under the execution, and paid the amount of the proceeds to the assignees, under an indemnity. It appeared, that the docket was struck on the 2d July, and that the fiat was issued on the 8th July, on the petition of *William Gibbons Glover*, a nephew of the bankrupt, who with *Thomas Glover*, the bankrupt's brother, were appointed assignees. The petitioners alleged, that Mr. *Passman* had never before been concerned for *W. G. Glover*, the petitioning creditor, but was introduced to him by the bankrupt; that the fiat was sued out by *Passman*, in confederacy with the bankrupt and *W. G. Glover*; for the purposes of the bankrupt, and that the petitioners believed that the act of bankruptcy was concerted between them; that there was little property besides the sum of 70*l.* 19*s.* so levied under the execution; that the petitioning creditor, and his co-assignee, were persons in humble circumstances of life; and that the former was not a creditor for the sum of 100*l.*

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In answer to the petition, Mr. *Passman* made an affidavit, alleging that the act of bankruptcy was committed some months before the issuing of the fiat; and he denied in general terms, all concert with the bankrupt.

The bankrupt also swore, that an execution being put into his house by *Clare* and *Brown*, he consulted Mr. *Passman* on the best mode of avoiding the execution, and getting the man out of possession, and that Mr. *Passman* advised him to execute a deed of assignment for the benefit of his creditors.

The petitioning creditor swore, that the bankrupt owed him 70*l.* and upwards for money lent, and that the remainder of the debt was constituted of a promissory note given by the bankrupt to the wife of the petitioning creditor, before her marriage.

In reply to these affidavits, it was sworn by a Mr. *Spilsbury*, that notwithstanding the denial of *Passman*, he did on one occasion state, that no other creditor but *Clare* had a debt sufficient to issue a fiat.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. It is very plain, that this is the fiat of the bankrupt, concerted by him with his attorney and relations, for the sole purpose of defeating the execution of the petitioners. And there is no answer to the express allegation in the petition, that the act of bankruptcy was concerted by the bankrupt and his attorney. For, though Mr. *Passman* swears that the act of bankruptcy was committed some months before the fiat was issued, he does not venture to deny that the act of bankruptcy was concerted. It does not appear, that the bankrupt has any other property than what was levied under the execution, the greater part of which will be exhausted

in the expenses of working the fiat; so that there will be hardly any thing left to divide among the creditors. The petitioning creditor's debt, also, is insufficient, from their own shewing; as part of it is made up of a note of hand given to the petitioning creditor's wife *dum sola*.

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Sir G. ROSE.—Although, to sustain a fiat on a debt due to the wife *dum sola*, she must in general join with her husband as petitioning creditor; yet, where a note or bill of exchange has been given to her before marriage, that, being a negotiable instrument, is transferable to and becomes the sole property of the husband by the marriage; and he alone may sue out the fiat (*a*).

Mr. Temple, *contra*. Since the passing of the statute, under the authority of which this Court was established, it is no objection to the validity of a fiat, that it is concerted by the bankrupt. The 42d section of the Bankruptcy Court Act (*b*) is express on this subject. By that section it is enacted, "That from and after the passing of the act, no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them." The only ground, therefore, for annulling the fiat that can possibly be urged is, that the act of bankruptcy was concerted. Now, on this point the petitioners say, that they *believe* only that the act of bank-

(a) See *M'Feilage v. Holloway*, 1 B. & Ald. 218; *Ex parte Barber*, 1 G. & J. 1, and 1 Deac. Bank. Law, 99.

(b) 1 & 2 Will. 4. c. 56.

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ruptcy was concerted. But will the Court act upon this loose and general statement, when we expressly deny all concert whatever? No satisfactory proof has been adduced, from which it can be inferred that the act of bankruptcy has been concerted; and as to all other objections on this ground, they are now of no avail.

Mr. Swanston, in reply, was stopped by the Court.

Sir JOHN CROSS.—The petitioners in this case are execution creditors for the sum of 70*l*. There is no question but that their debt was a valid debt, and that the execution was regularly issued. It was no sooner put into the bankrupt's house, than a proposal was made to him by the bankrupt, through his solicitor, to accept of an assignment of the bankrupt's goods and stock in trade, instead of levying under the execution. And when this proposal was declined, on the ground that such assignment would be an act of bankruptcy,—which there is no doubt would be the necessary consequence,—the solicitor, somehow or other, came into contact with a nephew of the bankrupt; and whether by instructions from the bankrupt, or by the advice of the solicitor,—it is not sufficiently explained,—the nephew strikes a docket against the bankrupt; and the solicitor then acquires the knowledge of an act of bankruptcy occurring a year ago, by the denial of the bankrupt to a creditor. How did the solicitor obtain the knowledge of this fact, except from the information of the bankrupt himself? Such is the act of bankruptcy on which this fiat is founded. Then what is the nature of the petitioning creditor's debt? He readily swears, on striking the docket, to a debt of 100*l*. and upwards; and he afterwards swears

before the Commissioners, that 75*l.* was for money lent to the bankrupt, but he does not state *when* the money was lent, or *where*, or *for what purpose*. Now, when I look to all the circumstances of this case, I can hardly give credence to this statement. He alleges, that his motive for issuing the fiat was, to prevent the property from being swept away by the execution creditor. But the execution creditor was only a creditor for 70*l.*; while the expenses of working the fiat, and enabling the bankrupt to get his certificate, would far exceed that sum; and yet it does not appear, that the bankrupt was possessed of any other property, than what was taken under the execution. But this is not all. How did the parties proceed in the proof of debts under the fiat? It is somewhat remarkable, that all the principal creditors who have proved debts are relations of the bankrupt. There is, first, *Thomas Glover*, a brother of the bankrupt, who has proved for the sum of 60*l.* for money lent; but *when*, or *where*, the money was lent, does not appear. Then *Catherine Glover*, the bankrupt's sister, has proved for 100*l.* for rent; but rent for what? The premises, in respect of which the rent is claimed, are nowhere stated in the deposition; and there is a discrepancy in the proceedings in regard to this proof; for the bankrupt, in his balance sheet, states the amount of rent due to this individual to be only 88*l.* Next comes *William Glover*, another relation, who is a hair-dresser, and he has also proved for 64*l.* for money lent, without saying *when* or *where* the loan took place. And then follows *William Gibbons Glover*, the petitioning creditor, who has proved for 175*l.*, and part of whose debt I have already observed upon. There are one or two other proofs of a similar kind, which make the proofs of the

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bankrupt's relations amount to 400*l.* and upwards; while the debts of the other creditors, who have proved under the fiat, amount only to 139*l.* Now, can we come to any other conclusion, than that the whole transaction,—compounded of the petitioning creditor's debt, the act of bankruptcy, and the proofs under the fiat,—was a fabrication from beginning to end; and that the sole object in issuing the fiat was to defeat the execution creditor, and to enable the bankrupt to get his certificate? I am of opinion, that the fiat was fraudulently issued, and was contrived between the different parties concerned, not for the purpose of distributing the bankrupt's effects among his creditors, but to defeat the just rights of the petitioners; and that it ought for that reason to be annulled.

Sir GEORGE ROSE.—It becomes unnecessary to refer to the 42nd section of the act of parliament, which declares that a fiat shall not be invalid by reason of its being concerted between the petitioning creditor and the bankrupt; for, in the present case, I am of opinion that this is not the fiat of the petitioning creditor, but of the bankrupt himself. I admit that after this enactment we cannot annul a fiat for concert alone; but then we may look to the concert, in connection with the other circumstances of the case. Neither am I disposed to dispute the proposition, that any creditor may properly take out a fiat to defeat an execution; but then it must not be the bankrupt's fiat. I wish to divest this case of all the circumstances which do not properly belong to it; one of which is, that the bankrupt wishing his property to be fairly divided amongst his creditors, concerted a fiat for that purpose with the petitioning creditor. That representation of the facts has been strongly

urged to us in argument by the counsel for the petitioning creditor; but this is no such case. The ground on which the judgment of the Court proceeds is, that the fiat was fraudulently issued. Mr. *Passman* has not answered satisfactorily to my mind the charge of collusion with the bankrupt, nor the statement of Mr. *Spilsbury*, who expressly swears that *Passman* assured him that no other creditor but the petitioners had a debt large enough to issue a fiat against the bankrupt. Mr. *Passman* traverses this statement, generally, in the words of a special pleader, that he did not use such words; but he does not deny having made use of words *to the like effect*; which it is always usual to insert in an affidavit denying having spoken particular words imputed to the deponent, when there is no foundation whatever for the charge. Then Mr. *Passman* says, that he did not look to the property of the bankrupt to repay him the costs of issuing the fiat, but to the petitioning creditor, well knowing that the bankrupt's property would be insufficient for that purpose. Does not this strengthen the evidence of this being the bankrupt's fiat, or rather the fiat of the bankrupt in collusion with the solicitor of the petitioning creditor? Then, on referring to the proceedings, I do not find any legal proof of the act of bankruptcy, nor am I satisfied with the proof of the petitioning creditor's debt. But the circumstances I have already dwelt upon are quite sufficient to induce me to concur in superseding this fiat, on the ground of fraud.

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ORDER, that the fiat be annulled, with costs.

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*Westminster,
November 7th.*

The date of a certificate written on an erasure ought to be explained by affidavit.

Ex parte JAMES BROWN. — In the matter of JAMES BROWN.

THIS was the petition of the bankrupt to annul the fiat, upon the consent of all the creditors. A difficulty had been raised at the Bankrupt Office in drawing up the order, in consequence of the date of the certificate of the Commissioners being written upon an erasure.

Mr. *Anderdon*, in support of the petition, applied for an order that the certificate might pass.

Sir GEORGE ROSE.—The proper course is for the petitioner to make an affidavit that the erasure was made before the signature of the creditors, and with the knowledge of the Commissioners. Upon doing this, you can take the Order.



Ex parte THOMAS SNAPE.—In the matter of JOHN RANSFORD.

*Westminster,
November 7th.*

One of the proprietors of a Joint Stock Banking Company having failed to pay the amount of a further call upon his shares, and having become bankrupt; *Held*, that the Company had no right of proof for the amount of such call, before an account was taken of the debts and credits of the partnership.

In a petition to prove and stay the certificate, it is a necessary allegation that the amount of the debt sought to be proved will turn the certificate.

THIS was the petition of a public officer of a Joint Stock Banking Company for an Order to prove, and stay the certificate. The petition stated, that in May 1835 the bank was established, pursuant to the provisions of the 7 *Geo. 4. c. 46.*, and that upon the formation of the partnership a deed of settlement bearing date the 11th May 1835 was executed by the several parties concerned, being expressed to be made between certain persons

therein described of the first part, the bankrupt and one *Henry Bradshaw* of the second part, and the several other persons whose names were, or should be, thereunto subscribed of the third part. That by a certain clause, No. 1, contained in the indenture, it was provided and agreed, that the several persons parties to the indenture should and would become partners together in a company or society to be called "*The Leamington Bank*," to be managed and conducted pursuant to the several rules, regulations, and provisions thereafter contained. That by a certain other clause, No. 3, contained in the indenture, it was provided and agreed that the capital of the company should be 200,000*l.* divided into 10,000 shares of 20*l.* each. And that the board of directors should have the sole power to allot to subscribers, or purchasers, such of the shares as had not at the date of the indenture been subscribed for and allotted; and that the holders of shares should be designated by the name of "*Proprietors*." By the clause No. 12, it was provided, that every proprietor of shares should pay the instalment of 5*l.* per share on or before the 12th May then instant, and that a general meeting, specially called for the purpose by the board of directors, should have power to come to a resolution that all the proprietors or shareholders should be called upon to pay a further instalment on such shares. By the clause No. 13, it was provided, that in case any instalment should remain unpaid for the space of one calendar month, it should carry interest at the rate of 5*l.* per cent per annum from the day on which the same ought to have been paid. And that no proprietor should be allowed to exercise any right, or be entitled to any dividend, bonus, or other benefits under the same, until he should have paid the

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amount of every call in respect of the shares to which he might be entitled, together with all the interest which should have become due and payable thereon. By the clause No. 33 it was provided, that the business of the Company should be under the exclusive management and control of a board of directors, which should be composed of not more than six, nor less than four proprietors. By the clause No. 70 it was provided, that the board of directors should have full power to commence, institute, and prosecute, and to defend, in the name of any one of the public officers of the Company, as the nominal plaintiff, petitioners, prosecutors, or defendant, any actions and suits, and also any petition to found any commission of bankruptcy, against any person whatsoever, whether a proprietor of the Company, or for any other matter relating to the concerns of the Company, and to discontinue, abandon, release, or become nonsuit in any such action, suit, or proceeding, as the board of directors should think fit. By the clause No. 71 it was provided, that it should be lawful for the board of directors to prove any debt due to the Company from any bankrupt or insolvent, whether proprietor or not, and to receive the dividends payable in respect of the same, and to act in all matters arising out of or under any such bankruptcy or insolvency, and to direct and empower any public officer of the Company, or the manager, or any other person, to become and act as assignee under any commission of bankrupt, or of any insolvent debtor's estate, and to sign the certificate, release, or other discharge of any bankrupt, insolvent, or other person, who should be or stand indebted to the said Company.

The bankrupt subscribed for and had allotted to him 100 shares, and executed the deed of settlement as pro-

prietor of such shares; and the instalment of 5*l.* per share, which by the twelfth clause of the deed of settlement it was provided should be paid on or before the 12th May 1835, was duly paid and satisfied in respect of these 100 shares. On the 17th November 1835, the bankrupt subscribed for and had allotted to him 100 other shares, upon which also the instalment of 5*l.* per share was thereupon duly paid; and the bankrupt continued proprietor of the 200 shares down to the 25th January 1837, when a further instalment of 5*l.* per share was called for, pursuant to the provisions of the deed of settlement, of which 2*l.* 10*s.* per share was to be paid on or before the 26th April then next, and the remaining 2*l.* 10*s.* on or before the 8th August then next. The bankrupt never paid any portion of this last call, which on his 200 shares amounted to the sum of 1000*l.*

On the 15th July 1839 the fiat issued. On the 8th August 1839 the bank applied to prove for the 1000*l.*, but the proof was rejected by the Commissioners. The petition alleged, that upon a final settlement of all accounts between the bankrupt and the partnership, a balance would be found due from him, to the full amount of the said sum of 1000*l.*

The prayer was, that the petitioner, as the public officer of the banking Company, might be at liberty to prove for the sum of 1000*l.*, and that until such proof could be made, the allowance of the bankrupt's certificate might be stayed; and that the petitioner, on behalf of the said Company, might be at liberty to assent to or dissent from the allowance of such certificate; or, if the Court should be of opinion that the Company were not entitled to prove, until the accounts between the bankrupt and the said Company were adjusted,—then that

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the allowance of the certificate might be stayed, until an account could be taken, and the amount due thereon ascertained.

Mr. *Girdlestone*, and Mr. *Rolt*, in support of the petition. Besides the clauses of the deed, as stated in the petition, it may be proper to call the attention of the Court to the 14th clause, which declares, that the shares of any proprietor shall be forfeited, on non-payment of any call for the space of two calendar months; and to the 67th clause, which gives the directors power to remit any forfeitures. This petition is preferred under the provisions of the 7 *Geo. 4. c. 46. s. 9.*, which declares, that all actions, suits, and also all petitions to found any commission of bankruptcy against any person, may be commenced or instituted on behalf of any banking company, against any person, whether a member of the company, or otherwise, in the name of any one of the public officers of the Company, as the nominal plaintiff, or petitioner. In the deed of settlement, there is an express covenant on the part of the bankrupt, to bring in or pay the sum of 1000*l.* to the common fund, for the purposes of the partnership.

Sir GEORGE ROSE.—In this case, part of the prayer of the petition is, to stay the certificate; and there is no allegation in the petition, that the amount of the debt sought to be proved would be sufficient to turn the certificate.

Sir JOHN CROSS.—That omission appears to me to be fatal to so much of the petition, as seeks to stay the certificate. In general, a defective allegation in a pe-

tion may be supplied by an order for leave to amend; but not in the case of a petition to stay the certificate.

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The argument then proceeded on the right of proof.

Mr. *Girdlestone*, and Mr. *Rolt*. The rule in bankruptcy is, we admit, that an unascertained balance cannot be proved by one partner against another; but there is an exception to this rule, in the case of fraud. Therefore, where one partner draws out fraudulently part of the partnership funds, and becomes bankrupt, it has been held that the other partners may prove for the amount so abstracted; *Ex parte Harris* (a). In that case Lord *Eldon* says, "In order to establish a right of proof for the joint estate against the separate estate, or for the separate estate against the joint estate, it must be made out, that the money was taken improperly and fraudulently. In this sense, improperly and fraudulently, that it was taken against the contract between the parties, express or implied; or, as against an individual partner, to increase his private estate. I have oftener than once expressed my confirmation of that opinion, that those circumstances would, in a legal sense, constitute fraud; for if a case occurred, in which either by inference from the terms, or by the express terms of an agreement, there was a contract to act, or I should rather say a prohibition from acting, in a particular manner, and the partner did that act, without the knowledge, privity, consent, or subsequent approbation of his partner, and to the intent to increase his private funds, that would be *prima facie* fraud." According to Lord *Eldon's* definition, therefore, the fraud consists in contravening the

(a) 1 Rose, 487.

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terms of the partnership contract ; and the fraud there alluded to was, the taking money out of the partnership funds, contrary to the articles of partnership. Upon the same principle, we contend, that the omission to pay money into the funds of the partnership, contrary to the contract between the partners, will be equally within the definition. The rule as to proof between partners appears to be this ; that where one partner can sue another in a court of equity,—or where he can sue him at law, and a court of equity would not restrain him from so suing,—in either of these cases the partner can prove. And it has been determined, that where one of two partners paid the whole price of the goods, which were to constitute the partnership stock, to which both partners were to contribute equally, he had a right of action against the other partner, for his moiety of the price to be furnished by him in the first instance ; although there might be an account to be taken between them, as partners, upon the subsequent disposal of the joint stock ; *Venning v. Leckie (a)*.

Sir JOHN CROSS.—It is admitted to be the rule, that one partner cannot prove against another, until all the partnership creditors are paid in full. But this petitioner says, that his case is an exception to that rule, on the ground of a fraudulent breach of the contract of co-partnership. It does not appear to me, however, that he has brought his claim within the principle of the exception. We must deal with this case precisely like that of one of two partners, divested of all the complication of the clauses in the deed of settlement. Suppose one of two partners has not brought into the business 1000*l*. for his share of the capital, and becomes

(a) 13 East, 7.



a bankrupt; could the other partner prove against his estate, before he had rendered an account of the 1000*l.* to be brought in by himself? I apprehend he could have no such right. The same principle applies to the present case.

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Sir GEORGE ROSE.—Without embarrassing the case with the special circumstances that attach to it, it appears to me, from the deed itself, that this call of 1000*l.* constitutes no legal debt due from the bankrupt to the Banking Company.

Petition dismissed, with costs.

Ex parte THOMAS NESBITT and others.—In the matter of JOSEPH MOULD and CHARLES MOULD.

Westminster,  
Nov. 12.

THIS was the petition of the assignees to substitute another petitioning creditor's debt, and that the fiat might be declared valid; or that a new fiat might issue, at the costs of the present petitioning creditor. It appeared, that the fiat issued on the 25th June 1839, on the petition of one *William Whitchurch*; who on his examination before the Commissioners admitted, without any endeavour to conceal the matter, that on the day after the fiat was issued, he had received from one of the bankrupts 150*l.* in part payment of his debt, without being conscious that there was any illegality in such a proceeding. He had since refunded the money, with the approbation of the Commissioners, and various sales had taken place under the fiat.

Where a petitioning creditor, in perfect ignorance of the illegality of the transaction, received part of his debt from the bankrupt, after the issuing of the fiat, and had refunded what he had so received, with the approbation of the Commissioners,—the Court, on the application of the assignees, ordered the fiat to be proceeded in.

Mr. *J. Russell* was in support of the petition.

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Mr. *Swunston* appeared for Mr. *Whitchurch*, the petitioning creditor.

Sir JOHN CROSS.—The only application, that is necessary to be made under these circumstances, is under the 8th section of the act of parliament (a), which gives the Lord Chancellor power, either to supersede the commission, or to direct it to be proceeded in.

The COURT made the following

ORDER, that the existing fiat was, under the circumstances, a valid fiat, and that the same should be proceeded in; and that the petitioning creditor, *William Whitchurch*, should pay the costs of this application.

(a) 6 Geo. 4. c. 16.

Ex parte WILLIAM RICHARD RAVENSCROFT and others.

—In the matter of RICHARD GEORGE BEESLEY and JOSEPH HEAWOOD.

Westminster,  
November 7th.

Special order made to impound a separate fiat, in favor of a subsequent joint fiat.

THIS was the petition of the assignees under the joint fiat, praying that a separate fiat which had been issued against *Beesley* might be annulled, in favour of the joint fiat.

It appeared, that the two bankrupts were in partnership as cotton spinners, and that the separate fiat against *Beesley* issued on the 24th July, under which however he was not adjudged a bankrupt until the 22d August;

and on the 9th September a person who was a public accountant, and not a creditor of the bankrupt, was chosen assignee. *Beesley* had not passed his last examination, nor obtained his certificate.

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 and others.

A joint fiat issued against both the bankrupts on the 27th July, under which they were adjudged bankrupts on the 1st August; and on the 24th August the petitioners were chosen assignees, who were considerable creditors under the joint estate, as well as against *Beesley's* separate estate. Debts to a large amount had been proved, and still remained to be proved, against the joint estate. The petitioners alleged, that the joint effects were of much greater value than the separate property of *Beesley*, and that no sales had been made under the separate fiat.

Mr. *Swanston* appeared in support of the petition.

Mr. *Bethell* *contrà*.

Sir GEORGE ROSE.—The better plan will be, under these circumstances, to impound the separate fiat, giving the assignee under that fiat power to inspect the proceedings from time to time under the joint fiat, for the purposes of the separate estate.

Sir JOHN CROSS entertained some difficulty in the matter, but finally concurred in the following

ORDER, that the separate fiat should be deposited in the office of the secretary of bankrupts, together with all proceedings taken under it, and that all further proceedings under the same should

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and others.

be stayed ; that the assignee under the separate fiat be restrained from intermeddling with that estate, but to have the power of inspecting the proceedings from time to time under the joint fiat, for the protection of the interests of the separate creditors ; that he account before the Commissioners for all monies and effects of *Beasley* (if any) which have come to his hands ; and that the proof of debts under the separate fiat be transferred to and filed with the proceedings under the joint fiat.

Westminster,  
November 12th.

Although a fiat is annulled, the bankrupt has a right to have it enrolled of record, for the purposes of an action ; and where the petitioning creditor refused to produce it for enrolment, the Court ordered it to be enrolled, and the petitioning creditor to pay the costs of the application.

Ex parte THOMAS MAY.—In the matter of THOMAS MAY.

THIS was the petition of the party against whom a fiat had issued, which had been annulled for want of prosecution, praying that the same might be enrolled, in order that it might be produced in evidence in support of an action brought by the petitioner against the petitioning creditor, for maliciously suing out such fiat against him. It appeared, that the fiat was in the hands of the petitioning creditor ; and that the petitioner had applied to him for its production, in order to have it enrolled at the petitioner's own costs, but that the petitioning creditor refused to produce it for that purpose.

Mr. *J. Russell*, and Mr. *Anderdon*, in support of the petition. The fiat, though in the hands of the petitioning creditor, yet, being the process issued by this Court, is subject to the jurisdiction of the Court. This application is rendered necessary under the provisions of the

2 & 3 Will. 4. c. 114. s. 8., which declares that no fiat, nor any adjudication of bankruptcy, or appointment of assignees, or certificate of conformity, shall be received in evidence, unless the same shall have been first entered of record in the Court of Bankruptcy. The 96th section of the 6 Geo. 4. c. 16. was supposed not to apply to fiats in bankruptcy, and therefore the above enactment was made for the purpose of enabling fiats to be enrolled. Notwithstanding the fiat has been annulled, it is not extinguished; the process of annulling only prevents its legal operation. The petitioner submits, that the Court will think it its duty to interfere, and prevent the petitioning creditor from defeating the action by the omission of this requisite formality.

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Mr. *Swanston*, and Mr. *Bethell*, for the petitioning creditor. The 8th section of the 2 & 3 Will. 4. c. 114. has reference exclusively to fiats in actual operation, and not to those which have been annulled. This appears from the previous enactment of 6 Geo. 4. c. 16. s. 96., which is confined to such commissions only as have taken effect; and this enactment is by the subsequent statute only extended to *fiats*; there is no jurisdiction, therefore, in this Court to make the Order required, after the fiat has been superseded. [Sir *John Cross*. What do you say to *Ex parte Cowan* (a), where it was determined that the Lord Chancellor might make an Order binding on the parties to the bankruptcy, notwithstanding the commission had been superseded?] That case does not apply to the enrolment of a document, which has become a nullity. The fiat, after it has been

(a) 3 B. & Ald. 123.

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annulled, is a mere piece of waste paper. There is no precedent for such an Order as that now applied for.

Mr. *Russell*, in reply, was stopped by the Court.

Sir JOHN CROSS.—In this case, the bankrupt says that the fiat has been annulled, but not recorded. Now the 5th section of the 2 and 3 Will. 4. c. 114. enacts, that all fiats, and all adjudications &c. may and shall be entered of record in the Court of Bankruptcy, upon the application of, or on behalf of, any party interested therein, on the payment of the fees thereafter mentioned, without any petition in writing presented for that purpose. The bankrupt against whom the fiat was issued, is a party interested therein; and he is perfectly right in stating, that under the provisions of the 8th section of the statute the fiat cannot be offered in evidence, unless it has been entered of record. Here, therefore, is an action pending, which must fail, if the fiat is not recorded. The party who has got possession of the fiat has shown no reason for his refusal to produce it, except that it will give the petitioner an opportunity of trying the action; a good reason, as it appears to me, for granting the prayer of the petition. It is said, however, on the part of the respondents, that this Court has no jurisdiction to make any Order, because the fiat has been annulled. I have not the least doubt of our jurisdiction, on the authority of the case I have cited of *Ex parte Cowan*. And, in addition to the clauses of the acts of parliament already adverted to, I may refer to the 95th section of the 6 Geo. 4. c. 16., which enables the Lord Chancellor to appoint a proper officer “to enter of record *all matters* relating to commissions.”

Sir GEORGE ROSE.—The only difficulty I have in making the Order is, as to the party whom we shall direct to pay the costs of this application. As it has been rendered necessary, however, by the refusal of the petitioning creditor to comply with the legal requisition of the petitioner, I think the petitioning creditor must pay the costs.

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ORDERED as prayed; the petitioning creditor to pay the costs of the application.

Ex parte ELIZABETH PALMER and others.—In the matter of GEORGE PEACH.

THIS was the petition of *cestui que trusts* for the substitution of a new trustee in the room of the bankrupt, and for liberty also to prove for a sum of 1500*l.*, which was lent to the bankrupt upon his promissory note. The amount of the remaining trust fund was 350*l.*, which was standing in the joint names of the bankrupt, and a deceased co-trustee.

Westminster,  
November 20th.

On the appointment of a new trustee, without the usual reference, there must be an affidavit as to his fitness for the appointment.

Mr. *Anderdon*, in support of the petition, submitted to the Court the propriety of appointing the new trustees, without the usual reference, as the property was so small in value, and there was no doubt of their respectability.

Mr. *Swanston*, *contra*.

The COURT said, that if the usual Order was dispensed with, an affidavit must be made as to the fitness of the new trustees.

ORDERED as prayed, upon the production of the necessary affidavit.

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Westminster,  
November 20th.

A bankrupt was permitted to surrender to a commission issued twenty-three years ago, where no fraud was imputed to him, in not having previously surrendered; he paying the costs of the meeting for that purpose.

Ex parte JOHN TARLETON.—In the matter of JOHN TARLETON.


**THIS** was the petition of the bankrupt for leave to surrender, under the following circumstances stated in the petition.

The bankrupt, and *Daniel Backhouse*, previous to the year 1802, had carried on the business of merchants in partnership; but on the 16th July 1802 the partnership was dissolved, and notice of such dissolution was duly advertised in the Gazette; after which time the petitioner never traded. In November 1814 the petitioner was advised, that by going to Holland he could make an arrangement, which would be very advantageous in the settlement of his West India affairs, by relieving some estates in Demerara from a prior mortgage in favour of persons resident in Holland; and the petitioner proposed proceeding from Holland to the West Indies, for the purpose of there winding up the concerns of *Tarleton* and *Backhouse*. The petitioner accordingly left England and went to Holland on the 9th April 1815, having first executed a conveyance of his landed property to his son *John Collingwood Tarleton*; but no part of the partnership effects and property was comprised in such conveyance. The petitioner stated, that when he embarked for Holland he was possessed, independently of his partnership property, of a very large real and personal estate, the former producing an income of 4611*l.*, and the latter amounting to upwards of 90,000*l.*, and that the partnership property was also of very considerable value. On the 22d June 1815, while the petitioner was abroad,




a commission of bankrupt was issued against him, grounded on the petition of the executors of Mr. *Backhouse*; upon which the petitioner's son, Mr. *J. C. Tarleton*, without the knowledge of the petitioner, presented a petition to the Lord Chancellor, in the name of his father and himself (but not signed by his father), praying that the commission might not be advertised; when the Chancellor directed an issue, which was tried in the spring of 1816; when the jury, with the concurrence of the judge, found that the petitioner was a bankrupt, and upon the matter being again brought before the Lord Chancellor, he ordered the commission to be proceeded with. The commission was accordingly advertised in May 1816, and two of the executors and sons-in-law of *D. Backhouse*, and *J. Barnes*, a friend of their's, but not a creditor of the petitioner, were chosen assignees. On the 5th August 1824 a renewed commission was issued. The petitioner alleged, that his debts, with the exception of certain bonds, did not amount to 300*l.*, which sum was owing to other parties, and not to the executors and sons-in-law of *Daniel Backhouse*; but that the petitioner had been informed, that certain sums had been proved under the commission by some persons; the particulars of which proofs the petitioner had had no opportunity to investigate; and having been advised by counsel that he was no bankrupt, he determined to resist the commission. From 1816 to 1821, the petitioner was in expectation, and led to believe, that *J. C. Tarleton* was making, or would be able to make, arrangements for the supersedeas of the commission with the assignees, or was taking, or would take, proceedings to try the validity thereof. In the year 1827, the petitioner for the first time discovered that his son had become the purchaser

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of the *Collingwood* estate from the assignees; and other circumstances induced him to suppose, that his son and the assignees were endeavouring to keep the entire management and benefit of the property to themselves, and to keep the petitioner abroad. The petitioner, never having acquiesced in the commission, in the year 1827 brought an action against the surviving assignees, for the purpose of trying its validity; but the defendants having obtained a rule that the petitioner should give security for costs, the action was stopped, as the petitioner had not the means to give such security. In June 1829 the petitioner brought an action of ejectment against a Mr. *Parker*, who had purchased part of his property at Liverpool from the assignees, with the view of trying the validity of the commission; upon which the assignees, on the 29th of November 1831, obtained an Order from the Lord Chancellor, that the petitioner should be restrained from proceeding in such action. On the 24th December 1832, the petitioner filed a bill in the Court of Exchequer against the assignees and his son, *J. C. Tarleton*, for an account; but, not having obtained any relief in the Court of Exchequer, he, in the year 1835, petitioned the Lord Chancellor for a reversal of the order of 29th November 1831; which petition was heard on the 2d August 1836, and in August 1837 was dismissed. On the 2d March 1838, the petitioner filed his bill in the Court of Chancery against his assignees and *J. C. Tarleton*, praying for an account, and that the sale to *J. C. Tarleton* might be declared fraudulent and void, and that an inquiry might be directed to a Master, to ascertain whether any and what sum of money was in fact justly due and owing from the petitioner to the executors of *D. Backhouse*, the petitioner being willing,

and offering, to pay what (if any thing) was justly due to them. To this bill the defendants pleaded, that the suit in the Exchequer was still pending; which plea was allowed; the bill in the Exchequer was afterwards dismissed, and a bill *de novo* filed in the Court of Chancery. The defendants, having taxed their costs of the dismissed suits, obtained an Order to stay the proceedings until the costs were paid. The petitioner alleged, that he had been deprived by the commission of all his property, and that for several years past he had had no funds whatever for his support, except such as had been derived from the assistance of a relation; but that such assistance has ceased, and that his wife died lately at an advanced age, under circumstances of great privation; and that he had no funds whatever to pay the costs ordered to be paid by him. That he had always been advised by the most eminent counsel, from the time of the issuing of the commission against him, that it was not a valid commission. That he had never submitted to the commission, and had never, by any notice or summons or order served upon him, been called on to surrender to it. That he was advised that it was doubtful, whether, in consequence of his never having submitted to the commission, a court of equity could give him relief; and that although he was convinced of the invalidity of the commission, yet he was advised to submit himself to it, in order to obtain the desired relief. The petitioner alleged, that he had been informed that in the year 1828 so much as 17*s.* 6*d.* in the pound had been paid on the debts proved under the commission; and that there was now in the hands of the assignees a very large surplus of the petitioner's property. That

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the debts proved under the commission had been, or ought to have been, paid in full. That the petitioner was upwards of 83 years of age, and infirm of body. That he was willing and desirous, in order to obtain the desired relief, to surrender to the commission, and submit himself to be examined; but that from his advanced age and infirmity, he was desirous to be examined in London.

There were also various charges brought by the bankrupt against his assignees, as to the mismanagement of the property and other matters; but these allegations were abandoned by his counsel, on the hearing of the petition.

*Mr. Swanston*, in support of the petition, stated, that though the petition alleged a variety of matters, it was proposed to limit the present application to an order for leave to surrender, which he hoped the Court would permit to be taken in London, where the bankrupt was now resident; for it would be at the risk of his life to go to Liverpool to surrender. [*Sir G. Rose*.—Wishing to do all that is possible, can the Court do more than make the order for leave to surrender, retaining the petition?]

*Mr. Spence*, *Mr. Girdlestone*, and *Mr. Sharpe*, for the assignees. This is a case of gross obstinacy on the part of the bankrupt, in filing bills in equity for relief before he surrendered. He has omitted to surrender for twenty-three years, and has put the estate to enormous expense, by dragging the assignees into every court of law and equity. We call on the bankrupt to say, in what period from this time he proposes to surrender; for the assignees

do not believe, that he has any real intention to surrender. If the Court, however, makes an Order for that purpose, it ought to be a preliminary condition to the Order, that the costs of the assignees in defending the suits in equity should be paid. Those costs amount to 375*l*. [Sir G. Rose. We cannot go beyond the question, that the bankrupt should be permitted to surrender.] As the bankrupt asks a favour of the Court, and ought to have paid these costs, it is not an unreasonable condition that he should be ordered to pay them, before the Court accedes to the prayer of his petition. It is not a matter of right, that the bankrupt should surrender; it is merely a matter of indulgence; and in *Ex parte Carter* (a), it was held, that a bankrupt, obtaining leave to surrender after the time was out, must pay the costs of the indulgence. But it is for the Court to say, whether after all this delay on the part of the bankrupt, he ought to be permitted to surrender; for where the Court thinks that a bankrupt has not acted *bona fide*, in neglecting to surrender, it will dismiss his petition for that purpose; *Ex parte White* (b). As to various parts of the petition, the bankrupt has no *locus standi*; for, not having surrendered, he had no right to pray for any of those matters. And, if the Court detained the petition or directed it to stand over, as to those matters, it would sanction a most irregular application.

Mr. *Swanston* was not called on to reply.

Sir JOHN CROSS.—This is not an ordinary case. Although the bankruptcy took place twenty-three years back, the assignees admit that they had not yet wound

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(a) 4 Mad. 394.

(b) 2 Brown, 47.

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up the affairs, and that property was still to be got in, among which was West India property to a large amount. Every one knew, that the confusion which has arisen in West India property has occasioned great fluctuation in the value of such property, and had been the cause of great delay in realizing it. No blame therefore is attributable to the assignees, that they have not been able hitherto to wind up the affairs. But this is not the case of an obsolete bankruptcy; for the business is going on, and this aged gentleman is now willing to assist his assignees in realizing the property that remains to be got in. The petitioner alleges, that there will be a large surplus of property in the hands of the assignees; whether that is so or not, may become a question hereafter; but, at all events, it will not be right to shut the bankrupt out from leave to surrender; and it appears to me, that it would be unjust to impose upon him as a condition that he should first pay the costs of the suits in equity, when there is most probably a surplus, out of which the assignees may get those costs.

Sir G. ROSE.—There is no doubt, that the surrender of the bankrupt will benefit both himself and the creditors. The only question in this case, as it appears to me, is, whether the bankrupt ought to pay the costs of his surrender, or not. If a public meeting had been advertised for any purpose, the bankrupt might then indeed have taken advantage of that meeting, for the purpose of surrendering himself to his commission; but it is clear, that if he requires a private meeting for that purpose, it must be at his own expense. As to the case cited from *Brown's Reports*, we know that the law then was, that the non-surrender of a bankrupt to his commission was a crime

punishable with death ; and such being the serious consequence of the bankrupt's omission to surrender, the Lord Chancellor, when a case of that kind came before him, would act upon the principle subsequently expressed by Lord *Eldon*, who said, on an application of this nature, "I cannot give the bankrupt leave to surrender, unless I can recommend a pardon." But the law, as well as the practice, has been altered since that time; and a bankrupt is now permitted to surrender, where his omission to do so has not proceeded from any fraudulent intention. The Order therefore ought to be, that the bankrupt may have leave to surrender at such time and place as the Commissioners may appoint, he paying the costs of the meeting that may be called for that purpose, and that the rest of the petition as to other matters should stand over; the assignees being at liberty to apply to dismiss the petition as to those matters, in the event of its being kept hanging over their heads.

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ORDER, that the bankrupt may have leave to surrender on payment of the costs incidental to a meeting for that purpose; and the petition, as to other matters, to stand over.

Ex parte PHILLIS YOUNG and JOSEPH YOUNG.—In the matter of ELIZABETH GOWEN and ARTHUR SHANKS.

Westminster,  
November 6th.

THIS was the petition of the administratrix of a mortgagee of the bankrupt, and her husband, praying that joint property particularly described in the deed, "and all other the hereditaments of them, or either of them, situate elsewhere in the town of Morpeth;" the recitals, covenants, and premises in the deed relating solely to the joint property. Held, that the operation of the deed extended to a separate estate of one of the partners in the town of Morpeth.

Two partners,  
to secure a partnership debt,  
conveyed cer-

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the assignees might account for the proceeds of the sale of part of the mortgaged premises.

The bankrupts were in partnership as brewers; *Arthur Shanks* being separately entitled to a freehold public house and shop, with four dwelling-houses, stables, and gardens, at Morpeth in Northumberland, subject to a mortgage for securing the sum of 700*l.* and interest; which premises formed no part of the partnership estate.

By an indenture bearing date the 5th February 1838, and made between the bankrupts of the one part, and *John Anderson* of the other part, after reciting that the bankrupts were then indebted unto *John Anderson* in the sum of 884*l.*, the bankrupts, in consideration of this sum being due and owing to *John Anderson*, and for securing the payment thereof and interest, bargained, sold, assigned, transferred, and set over unto *John Anderson*, his executors, administrators, and assigns, certain messuages, together with brewery, malt-mill, and other hereditaments, which formed part of the joint property of the bankrupts, "and also all and singular other the hereditaments and premises of the said *Elizabeth Gowen* and *Arthur Shanks*, or either of them, situate and being in the yard in the said indenture mentioned, called the George and Dragon Yard, or elsewhere, in Morpeth aforesaid." To hold the same (subject to a mortgage thereon for 800*l.*) unto *John Anderson*, his executors, administrators and assigns, for the then residue of the term of 5000 years therein-mentioned, subject to redemption on payment of the sum of 884*l.* and interest; with a power of sale, in case of non-payment thereof. The assignees sold by auction the public-house and hereditaments, above described to be the separate property of *Arthur Shanks*; which realized the sum of 400*l.*; and



this sum *John Anderson*, by a notice in writing dated the 7th December 1838, required the assignees to pay over to him, as the party entitled to it under the deed of the 5th February 1838. On the 28th April 1838 a fiat issued against the bankrupts, when there was due to *John Anderson* on the above-mentioned security the whole of the principal sum of 884*l.*, with 9*l.* 16*s.* for interest. *John Anderson* died on the 15th February last, and letters of administration of his effects were granted to the petitioner *Phillis Young*. The petitioners alleged, that the value of the whole property, both joint and separate, comprised in the above-mentioned security, was inadequate (after satisfying the mortgages charged thereon) to the payment of the debt due to the petitioner *Phillis Young*, as such administratrix as aforesaid.

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Ex parte
Young
and another.

The prayer was, that an account might be taken of the principal and interest due to the petitioner *Phillis Young*, as such administratrix as aforesaid, upon the security so given to *John Anderson*; and also of the money arising from the sale of the above-mentioned premises, being part of the separate property of *Arthur Shanks*; and that the proceeds might be paid to the petitioner *Phillis Young*, as such administratrix as aforesaid, in part satisfaction of the said debt.

Mr. *Swanston* appeared in support of the petition.

Mr. *Bethell*, *contra*. The question depends on the construction of these words in describing the parcels in the indenture of mortgage:—"and also all and singular other the hereditaments &c. of the said *Elizabeth Gowen* and *Arthur Shanks*, or either of them, situate in the

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and another.

yard in the indenture mentioned, or elsewhere, in Morpeth." The sole question is, whether these words will convey the separate property of one of the bankrupts in the town of Morpeth. It is clear, that there is no intention shown by the recitals, or any other previous parts of the deed, to convey any *separate* property of either of the bankrupts; and the covenants for title contained in the subsequent parts are, that the two grantors are *jointly* entitled to the property conveyed. If there was any intention to convey separate property, would not the covenants be framed, so as to embrace the separate property? There is nothing whatever in the deed, except the words "or either of them," in the parcels, to lead to the conclusion, that any other property but the joint property of the bankrupts was intended to be conveyed—the covenant to sell, the recitals, the covenants for title, and all other parts of the deed relating solely to joint property; and there does not appear to be any intention of either of the parties to contract, as to any separate property. On the contrary, in the proviso for sale on non-payment of the mortgage money, it is expressly stipulated that the surplus of the proceeds of the sale shall be equally divided between the bankrupts.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—The property in dispute in this case belongs to one of the two bankrupts, and is situate in the town of Morpeth. By the terms of the deed, all the property of the bankrupts, or *either of them*, situate in the George and Dragon Yard, *or elsewhere*, in Morpeth, is conveyed to the mortgagee. It is clear from this,

that the deed included all the separate property of either of the bankrupts, as well as the joint property, which might be situate in the town of Morpeth. But it is said, that if the separate property of either of the bankrupts was intended to be conveyed, there would be an inconsistency in the proviso for sale, which provides that the surplus of the proceeds, after satisfaction of the mortgage money and interest, shall be equally divided between the bankrupts. There is certainly an inconsistency in the wording of that proviso. It was probably the original intention of the parties, when the deed was drawn, that only the joint property of the bankrupt should be conveyed; but, it being afterwards discovered that *Shanks* was entitled to some property of his own in the town of Morpeth, the words "or either of them," were added in the parcels, in order to reach such property; without advertng to the frame of the covenants and provisions in the deed, which related solely to joint property.

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Sir GEORGE ROSE concurred.

Mr. *Swanston* said, that the estate in question having been sold by the assignees, he did not wish to dispute the sale, and that he would consent to an Order for the proceeds of the sale to be paid over to the petitioners.

The COURT made the Order accordingly.



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*Westminster,  
November 21st.  
Sembles, the  
Commissioners  
have a discre-  
tionary power,  
in requiring, or  
dispensing with,  
the personal at-  
tendance of a  
creditor, in all  
matters of  
proof; and this  
Court will not  
interfere on the  
subject.*

**Ex parte MARY ANN SHAW.**—In the matter of **KIRKBY.**

**THIS** was the petition of a creditor on a bond, that the Commissioners might be directed to receive the affidavit of her debt, instead of compelling her to attend personally before them for the purpose of proving it. The bond was joint and several, and was entered into by the four bankrupts, together with a surety, with a proviso that any three or two of them should be bound to the obligee. The petitioner was eighty years old, and too ill to attend the meetings of the Commissioners, which were held at a distance of forty miles from the place of her residence. She accordingly sent an affidavit of her debt to be exhibited before the Commissioners; which they declined to receive, without a personal examination of the petitioner as to the consideration given by her for the bond; an objection having been made to the proof on the ground of usury.

**Mr. Swanston** was in support of the petition.

**Sir JOHN CROSS.**—If it had not been for a former decision, I should have thought that the Commissioners could not go into the consideration for the bond; as it is a specialty debt. But there is a case to the contrary.

**Sir GEORGE ROSE.**—We cannot interfere with the Commissioners. They are invested with a discretionary power in all matters of proof as to requiring the personal attendance, or not, of the creditor who seeks to prove; and I think we have no jurisdiction on the subject.—Instead of dismissing the petition, however, it may stand over generally.

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Ex parte CHARLES MARSTON.—In the matter of  
WILLIAM MARSTON.

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*Westminster,*  
Nov. 22 & 23.

THIS was the petition of a creditor, praying that the proof of a debt might be expunged, and impeaching the choice of assignees.

A joint creditor of a joint stock banking company may prove the amount of his debt under a separate fiat against one of the members of the company, for the purpose of voting in the choice of assignees, and assenting to, or dissenting from, the certificate; notwithstanding, previous to the issuing of the fiat, several other members of the company had become bankrupts, and one had died.

The fiat issued on the 19th August 1839, under which one *Richard Powdrell Hobson*, an accountant, was appointed provisional assignee. On the 9th September following the meeting was held for the choice of assignees, when the petitioner proved a debt of 840*l.*; and two other debts of 1472*l.* 1*s.* 4*d.*, and 300*l.*, were also then proved by other parties, and two other debts of 32*l.* 13*s.* 10*d.* and 45*l.* 8*s.* 8*d.* have likewise since been proved. Besides carrying on trade on his separate account, the bankrupt was a member of a certain joint stock banking company, called the Imperial Bank of England; and also of two other joint stock banking companies, called the Northern and Central Bank of England, and the North of England Bank; which were established under the provisions of the 7 *Geo.* 4. c. 46.; and the bankrupt was also one of the registered public officers of the Imperial Bank of England. The Imperial Bank of England became embarrassed and stopped payment in April 1839, and several actions were brought by creditors of that bank against the bankrupt, as such registered officer thereof; and judgments were obtained and entered up against him in such actions, subsequently to the date of the fiat. The petitioner alleged, that the bankrupt had duly paid all the calls in respect of the shares held by him in that bank, and was not indebted to the company in any sum of money whatsoever, at the

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time of his bankruptcy. At the meeting for the choice of assignees, one *John Whittenbury* was admitted to prove the sum of 3047*l.* for principal, and 27*l.* 1*s.* 4*d.* for interest, as a debt due from the bankrupt jointly with the other members of the Imperial Bank of England, upon, amongst others, a certain bill of exchange for 2,500*l.*, dated the 20th March 1839, alleged to have been indorsed to him by the banking company. This proof was made, for the purpose of voting in the choice of assignees, and assenting to, or dissenting from, the bankrupt's certificate, and taking any surplus which might remain of the bankrupt's estate, after full payment of his separate creditors. The admission of such proof, however, was objected to by the solicitors of the petitioner. In a return made on the part of the Imperial Bank of England to the Commissioners of Stamps, dated April 1st 1839, the names of 163 persons were set forth as all the parties concerned or engaged in the bank. Of these persons seven became bankrupt under separate fiats, before the issuing of the fiat against *W. Marston*, and five after the issuing of that fiat. And the Rev. *Jonathan Barker*, who was also for some time a member of the company, and whose name was included in the above return to the Stamp Office, died on the 16th March 1839. It was objected by the petitioner to the proof of *J. Whittenbury*, that the banking company was not at the time of issuing the fiat an actual subsisting or existing firm; but that the firm or partnership, in respect of which the liability of the bankrupt was assumed to exist, had actually before then been dissolved, and had ceased to be a firm, by reason of the before-mentioned bankruptcies of the several members of the company having taken place previously to the issuing of the fiat against *William Marston*, and of

the death of *Jonathan Barker*. The petitioner contended before the Commissioners, that the deposition of *Whittenbury* was defective, by reason that it did not allege that notice of the dishonour of the bills therein mentioned had been given to the Imperial Bank; whereupon the Commissioners inquired of *Whittenbury* whether he had given such notice; to which he answered, that the Union Bank, who were subsequent indorsers of the bills, had given such notice; but he admitted, that he had not given any notice whatever, and that he did not know, of his own knowledge, that such notice had been given by the Union Bank; but the objection was overruled by the Commissioners. The petitioner, and the other separate creditors, insisting on the invalidity of the proofs of *Whittenbury*, and of another creditor of the Imperial Bank under the like circumstances, nominated *Richard Powdrell Hobson* to be assignee of the estate and effects of the bankrupt *William Marston*; but the Commissioners acted upon the nomination made by *J. Whittenbury* and the other creditors, and thereupon appointed *William Broome* and *Richard Whittenbury* to be the assignees. The petitioner alleged, that the property of the bankrupt *William Marston* consisted of both real and personal estate, of very considerable value, and would be adequate to pay the separate creditors their debts in full, and that the petitioner and the other creditors were extremely desirous of having the administration of the estate of the said bankrupt placed under the direction of a person of their own nomination; and they submitted, that they were entitled to have *Richard Powdrell Hobson* appointed assignee of the estate and effects of the bankrupt. The prayer was, that the debt proved by *John Whittenbury* might be expunged; and that it

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might be declared, that *Richard Powdrell Hobson* ought to have been appointed, and ought now to be the assignee of the estate and effects of the said bankrupt.

Mr. *Anderdon*, and Mr. *Baron*, in support of the petition. The first question in this case is, whether a creditor of a joint stock banking company can prove against a separate shareholder of such company, without having obtained judgment against the company. The next question is, whether the debt proved by *J. Whittenbury* is a debt provable within the 62d sect. of the 6 Geo. 4. c. 16. This point was admitted, *sub silentio*, in *Ex parte Hall(a)*. The third point is, that the deposition of the creditor is defective; inasmuch as, it being a proof against an indorser on a bill of exchange, there was no evidence that any notice of the dishonour of the bill was given to the indorser. The fourth point is, that inasmuch as there were previous fiats issued against several members of this company, the fiat ought to have been directed, under the provision of the 17th section of the Bankrupt Act, to the same Commissioners to whom those former fiats were directed.

As to the first question. The right of a joint creditor of the company is limited to the remedy given by the act. In *Ex parte Hall*, it was assumed throughout, that the 1 & 2 Vict. c. 96. gave a creditor of a joint stock banking company the power of suing out a fiat against an individual member. The 7 Geo. 4. c. 46., which declares under what conditions copartnerships of more than six persons in number may carry on business as bankers, distinctly points out (at the end of the 1st section) the liability of the several partners. But, then,

(a) 3 Dea. 405.



this liability must be regulated by all the subsequent provisions of the act. Thus the 9th section provides for the bringing of actions and suits, and issuing commissions of bankrupt by and against such banking companies, and declares that all such proceedings shall and lawfully may be commenced or instituted in the name of any one of the public officers nominated for the time being of such copartnership, as the nominal plaintiff or petitioner. The words "shall and may" in this section are imperative, and not optional. No attempt has yet been made to make one of the partners of any joint stock banking company liable, before claiming against the others. [Sir *John Cross*. In this case, the bankrupt himself was a registered officer of the company.] But proof was not made against him as a registered officer, but as a partner with the other members of the firm. The 12th section also provides, in express terms, that a judgment obtained in any action or suit against the public officer, shall have the like effect against the *property*, but not against the *person*, of every member of the corporation, as if such judgment had been recovered against the partnership. It is only, therefore, by judgments against the public officer, that the company can be rendered liable; and no remedy can be had either by action or in bankruptcy, except by the mode pointed out by the act of parliament. A creditor is therefore bound to bring his action against the public officer, before he can come against the separate property of any individual member. [Sir *John Cross*. Does not your argument tend to this,—that if all the members of the company became bankrupt, there is no remedy against any one? But the 9th section declares, that all petitions to found any commission of bankruptcy against any person indebted to

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such copartnership shall be instituted in the name of one of the public officers.] The 9th section does not, in the latter part, which provides for proceedings at law or in equity *against* the company, make any mention of commissions of bankruptcy. You cannot say, that a fiat may be sued out, unless you can bring an action against the party; and the conclusion is, from the allegations in the petition, that Mr. *J. Whittenbury* has no right of proof against the bankrupt as a partner in this company.

As to the second proposition, whether the debt is proveable under the 62nd section of the 6 Geo. 4. c. 16.—That section declares, that in all commissions against one or more of the partners of a firm, any creditor, to whom the bankrupt is indebted jointly with the other partners of the firm, shall be entitled to prove his debt, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate. We say, that that section does not apply to this case; inasmuch as the previous fiats issued against several members of this company have worked a dissolution of the partnership; and the section was only intended to apply to existing partnerships; *Ex parte Morris* (a). Moreover, the other members of the company are solvent. If A., B., C., D., and E. are partners, and A., B., and C. are bankrupts, D. solvent, and E. a bankrupt, a joint creditor cannot prove against E. [Sir *George Rose*. My notion is, that a joint creditor could prove against any one of them, for the purpose of voting in the choice of assignees.] In the case of *Ex parte Morris*, the Vice-Chancellor decided to the contrary. [Sir *George Rose*. That case does not appear to me to apply to the present. There, the several persons liable were not partners,] but

(a) Mont. Rep. 218.

merely joint contractors; and there is a distinction between these two descriptions of persons. In *Ex parte Bauerman* (a), this Court recognized that distinction.] In *Ex parte Morris*, the Vice-Chancellor says, "With respect to the application to prove under section 62, I am satisfied that it applies only to subsisting partnerships at the time of the bankruptcy." There must have been a partnership in that case, otherwise the decision of the Vice-Chancellor would have been wrong. In *Ex parte Bauerman* we relied on the case of *Ex parte Morris*; but the Chief Judge said, "there is no doubt that the 62nd section is only applicable to existing partnerships at the time of the bankruptcy." Here there can be no existing partnership; because the partnership was not only dissolved by the bankruptcy of several of the partners, but also by the death of Mr. *Barker*. [Sir *John Cross*. Although partners dissolve their partnership, are there not still joint debts, and joint estate; and are they not still partners as to all by-gone transactions? Sir *George Rose*. There is never a complete dissolution of a firm, until all the partnership accounts are wound up. It is in every day's practice, that where a separate fiat is issued against one of several partners, a joint fiat issues against the other partners and the bankrupt partner; which shows that the partnership is not determined, as to the administration of the joint assets.] Admitting that to be the case, there are here several solvent partners; and in *Ex parte Bauerman*, the decision went upon the very point, that there was no solvent partner.

The third point on which the petitioner relies is, that the deposition of proof is defective for two reasons: 1st, because there was no proof before the Commis-

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(a) 3 Deac. 476.

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sioners that the bankrupt had notice of the dishonour of the bill ; and 2nd, inasmuch as at the time of making the proof it is alleged, that the 163 other persons, as well as the bankrupt *William Marston*, were jointly indebted to the deponent, although seven of them had previously become bankrupt, and the partnership was dissolved.

The last branch of the argument that we submit to the consideration of the Court is, that there having been previous fiats issued against several members of the partnership, the fiat ought to have been directed, according to the provision of the 17th section of the Bankrupt Act, to the same Commissioners to whom the former fiats were directed. [Sir *John Cross*. If the 62nd section, as you contend, applied only to existing partnerships, does not the 17th section equally apply to existing partnerships ?] Conceding that to be the case, it will only have the effect of getting rid of the fourth objection.

Mr. *Swanston*, *contra*, was stopped by the Court.

Sir JOHN CROSS.—It cannot be denied, that the question submitted to us in this petition is one of great importance, and that this, among many other cases, affords a melancholy proof of the danger of men engaged in commerce becoming partners in these joint stock banking companies. They are liable to be separately called upon for the debts of the company, and their certificates endangered thereby in the event of bankruptcy. The circumstances of the case also show what ill effects are produced by incautiously breaking down the barrier of the old law of the land, the cause and foundation for

which are not in general sufficiently known to those who intermeddle with it, and who thus let a torrent of evils escape, which were wisely guarded against by our ancestors. In this case, the bankrupt, who carried on trade on his separate account, unfortunately became a member of the Imperial Bank of England, which stopped payment in April 1839; and several actions were brought by the creditors of the bank against the bankrupt, and judgments obtained against him. It appears, that no less than twelve different members of the bank, besides Mr. *Marston*, have become bankrupt,—some shortly before, and some soon after, his own bankruptcy, which occurred in August 1839. A joint creditor of the bank proves a debt of 3047*l.* under the fiat against *Marston*, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate. And the object of the present petition is, to expunge that proof, and impeach the choice of the assignees, who were elected in consequence of such proof. It has been urged to us in the argument in support of the petition, that there is an essential difference between the present case, and that of an ordinary partnership; but, in my opinion, there is no difference whatever. In common cases of partnership, you cannot take in execution the separate property of an individual partner, without suing them all. Here you must sue the public officer, as the representative of the company. For this purpose, therefore, the cases are perfectly parallel. A fiat in bankruptcy is a species of statutable execution; and the act of parliament expressly gives a joint creditor a right to prove under a separate fiat, for the purpose of voting in the choice of assignees, and granting or withholding the certificate. But it is said, that the 62nd section,

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which gives this right, only applies to subsisting partnerships; and that the authority of the Vice-Chancellor's decision in *Ex parte Morris* (a) is fatal to the respondent's case. But the term "subsisting partnership" is a very equivocal expression; for, though a partnership may be dissolved as to one member of the firm by his death or bankruptcy, it is still a *subsisting partnership*, as to the other members of the firm. In the present case, however, a joint stock banking company must, under the provisions of the 7 Geo. 4. c. 46., be considered *quasi* a corporation; for it provides for the continuance of the partnership, notwithstanding the change of partners. Therefore death, bankruptcy, or the sale of shares, will not affect the identity of the partnership; it continues the same body under the same name, by virtue of the act of parliament. There is nothing which appears to me to prevent the creditor from proving, under the provisions of the 62nd section of the Bankrupt Act, for the purposes of the certificate and the choice of assignees.

It is then said, that the deposition of proof is informal, because it does not state that notice of dishonour was given of the bill of exchange. Now it has never struck me, that Commissioners of Bankrupt, in the admission of proofs, are to be guided by the strict rules of evidence that prevail in the courts of law. The Commissioners, in the course of conversation with the creditors who seek to prove against the drawer or indorser of a bill, inquire whether notice has been given to him of its dishonour, and if satisfied in this respect, they admit the proof. This objection must be treated as one *strictissimi juris*. It has never been contended,

(a) Mont. Rep. 218.

that the Commissioners improperly admitted the proof by abstaining from any such inquiry, and there is no affidavit of the fact. It appears to me, that the petitioner has made out no case for expunging the proof, or disturbing the choice of assignees.

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Sir GEORGE ROSE.—If there was ever a case on which the Order would proceed as a matter of course, it would be on a petition of a joint creditor to prove under a separate fiat against one of several partners, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate. The present petition, however, is presented, on the ground that the assignees were chosen by persons who ought not to have proved for this purpose under the fiat. In order to displace the right of Mr. *Whittenbury* to prove under this fiat, there has been pressed upon us all those remedies which are specifically provided by the 7 Geo. 4. c. 46. But are these remedies to divest a creditor of his rights under the former law? Before the decision of the Vice-Chancellor in *Ex parte Morris*, and since, it has been uniformly the practice to permit a partnership creditor to prove under a commission against one of the partners, with a view to the choice of assignees and the certificate. Upon the principle of partnership being distinguished from contract, it is impossible to say, from what appears in the report of *Ex parte Morris*, that there was in that case a subsisting partnership. Nothing is clearer, than that there is a wide distinction between a joint contract, and a joint partnership. How does the bankruptcy, or death, of one partner operate, as to a participation of the profits of the partnership? Do not the assignees in one case, and the executors in the other, come in for a share of the joint property? It is

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upon principles of equity, and according to established daily practice, that the proof now sought to be expunged, should be received; and there is no pretence for this petition.

Petition dismissed, with costs.

Ex parte JOHN BRADBURY and others.—In the matter  
of THOMAS BLADES WALDEN.

Westminster,  
Nov. 23.

A. and B. dissolve their partnership, when it is agreed between them, that B. shall retire, and that A. shall continue the business, and receive and pay all the partnership debts. At the time of the dissolution of the partnership, C., a lunatic, is a creditor to a large amount, having given D. a general power of attorney to act for him in the transaction of his affairs; and D. assents to the arrangement between A. and B., and agrees to accept A. as the separate debtor. A commission of lunacy afterwards issues against C., under which he is found by the inquisition to have become a

THIS was a petition of assignees to expunge the proof of a debt made by the committee of a lunatic, under the following circumstances :

The bankrupt, shortly before the year 1832, married the daughter of *John Anthony Hermon*, Esquire, and soon afterwards entered into partnership with one *William Bright*, in the business of drapers, at Liverpool, under the firm of "*Walden and Bright*." It was alleged by the party who made the proof, that *John Anthony Hermon* at various times lent divers sums of money to the firm of "*Walden and Bright*," for the use of their co-partnership, and that a promissory note was given for part of these advances by the firm of *Walden and Bright*, as follows :—

" Liverpool, October 5th 1832.

" £1750. 6s. 6d.

" We promise to pay, on demand, to *John Anthony Hermon*, Esq.; the sum of 1750*l.* 6s. 6*d.*, for value received, bearing interest at the rate of 5*l.* per cent. per annum.

" *Walden and Bright*."

lunatic three days before the date of the power of attorney; and D. is appointed his committee; A. afterwards becomes bankrupt. Held, 1, That D. might prove the amount of C.'s debt against the separate estate of A.; and 2, That the power of attorney, being for the benefit of C., was not vacated by the subsequent proceedings in his lunacy.



It was also alleged in support of the proof, that an account was settled between *Walden* and *Bright* and *John Anthony Hermon*, some time after the date of this promissory note; by which it appeared that a balance of 2946*l.* 6*s.* was due from *Walden* and *Bright*, including the amount of the note; and that on the 31st August 1835, the amount of the interest then due on such balance was paid by *Walden* and *Bright* to *Richard Hermon*, as the attorney and on behalf of *John Anthony Hermon*.

In the month of February 1836, *Walden* and *Bright* compounded with their creditors, by payment of a composition of 15*s.* in the pound; when, as was alleged by the petitioners, *John Anthony Hermon* agreed to accept such composition, and further agreed that the amount of such composition should not be payable to him, until it should have been paid to all the other creditors of the said firm. On this occasion, the following agreement was entered into between the bankrupt and *Richard Hermon*, as the attorney and on behalf of *John Anthony Hermon*.

“ 30, Bedford Row, 6 Feb. 1836.

“ To *Richard Hermon*, Esq.

“ Sir.—If you will sign the agreement on the part of your brother *John Anthony Hermon*, between *William Bright* and myself and our creditors, by which it is proposed that our creditors (except the said *John Anthony Hermon*) shall accept a composition of 15*s.* in the pound on their respective debts, payable at three, six, and nine months, and secured by our notes, and that the said *John Anthony Hermon* shall accept the like composition upon the debt due to him, amounting to 2946*l.* 6*s.*, but not to require payment of any part of such composition,

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until the compositions to all the other creditors are paid; I hereby engage to indemnify and hold you harmless for so doing, and I do also agree to allow and set off so much of the said debt due to the said *John Anthony Hermon*, as shall be remaining due and unpaid at the time of his death, together with any loss of interest by reason of the said composition in the mean time, out of and against any legacy or share of his property payable to me, or my wife, under the will of the said *John Anthony Hermon*. Dated this 6th day of February 1836."

On the 25th of June 1836, *Walden* and *Bright* dissolved their partnership; and it was alleged by *Richard Hermon*, that it was on that occasion agreed between the said bankrupt and *William Bright*, that the bankrupt should continue to carry on the business, and should take and retain all the stock and effects belonging to the partnership, and should be entitled to receive all the debts belonging thereto; and that the bankrupt should pay and discharge all the debts due and owing by the partnership, and should also pay *Bright* the sum of 800*l.* by certain annual instalments, for his share and interest in the partnership.

The bankrupt afterwards continued to carry on the business until the time of his bankruptcy; which took place on the 11th September 1837. The balance due from the firm of *Walden* and *Bright* to *John Anthony Hermon*, at the time of the dissolution of their partnership, amounted to the sum of 2209*l.* 14*s.* 6*d.*, including the amount of the promissory notes; and for this sum, together with 23*l.* 12*s.* for interest, making together 2233*l.* 6*s.* 6*d.*, *Richard Hermon*, the committee of *J.*

*H. Hermon* (who had been declared a lunatic) claimed to prove against the estate of *Walden*; inasmuch as *John Anthony Hermon* had, at the time of the dissolution of the partnership of *Walden* and *Bright*, agreed to release *Bright* from all liability to the debt, and had consented to take the bankrupt as his sole debtor, and had consequently become the separate creditor of the bankrupt.

The petitioners opposed the proof, on the ground that the alleged debt (if the same was in fact due) was due and owing from the bankrupt and *William Bright* jointly; and that it was still competent for *John Anthony Hermon* to sue *Bright*, who was solvent. The Commissioners, however, admitted the proof.

It appeared, that a commission of lunacy issued against *John Anthony Hermon* on the 23rd November 1837, under which it was found that he had been a lunatic from the 1st July 1834; and *Richard Hermon* was appointed his committee.

Mr. *Bethell*, in support of the petition. As *J. H. Hermon* was declared a lunatic from the 1st July 1834, and the alleged agreement to accept the bankrupt as his separate debtor, was not entered into until the 25th June 1836, the period of the dissolution of the partnership of *Walden* and *Bright*, there could have been no legal assent of *J. H. Hermon* to accept the bankrupt as his separate debtor. It is clear, that unless there is some distinct proof of that fact, *Bright* would continue liable to be sued by *J. H. Hermon* for the amount of the joint debt, notwithstanding the dissolution of this partnership; *Lodge v. Dicas* (a); *David v. Ellice* (b).

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Ex parte  
BRADBURY  
and others.

(a) 3 B. & Ald. 611.

(b) 5 B. & C. 196; 1 Carr. 368.

1839.

Ex parte  
BRADBURY  
and others.

Mr. *Swanston*, and Mr. *Bacon*, *contrà*. Before the commission of lunacy was issued, *Richard Hermon*, the committee, was acting under a general power of attorney given to him by *J. H. Hermon* on the 4th July 1834. The question is, therefore, whether the agreement of *Richard Hermon*, as the attorney of *J. H. Hermon*, to accept the bankrupt as his separate debtor, was not a legal and binding agreement, notwithstanding the subsequent commission of lunacy. It is admitted, that there is no express authority on this point to be found in the reports of the decisions of the English courts; but in *Bell's Commentaries on the Law of Scotland* (a), it is there said, that lunacy itself, without a commission, is not a revocation of a power of attorney; and in support of his proposition, the learned writer refers to the opinion of three eminent English lawyers, Sir *V. Gibbs*, Sir *S. Romilly*, and Mr. *Adam*, who all agreed that lunacy was not an abruption of a previous authority. And it was upon this principle, in the case of *Sargeson v. Sealey* (b),—where a person who was found lunatic had made a purchase, with the approbation of his only son, before the date of the inquisition,—that Lord *Hardwicke* refused to set aside the purchase, notwithstanding the inquisition found the lunacy to have commenced previous to the transaction in question. In the present case, upon the result of the evidence in the affidavits, it is clear that the power of attorney, and the exercise of the authority given by it, were for the benefit of the lunatic. It appears from the affidavits, that the bankrupt's partner, *Bright*, was insolvent at the time of the dissolution of their partnership; and that it was beneficial for the interests of the lunatic, that *Walden* should

(a) Vol. ii. p. 320.

(b) 2 Atk. 412.

be accepted as the separate debtor. There was therefore, in fact, no solvent partner at the time of the bankruptcy of *Walden*.

1839.

Ex parte  
BRADBURY  
and others.

Mr. *Bethell*, in reply. The Court cannot admit this proof to stand, unless there was a binding assent on the part of the creditor, to the joint debt being turned into a separate debt. It must not be forgotten by the Court, that the party who made this proof is the committee of the lunatic. Now, although the inquisition of lunacy is not conclusive evidence against strangers, as to the period from which the party is found a lunatic, it is conclusive against this petitioner, as committee. To decide, whether this power of attorney was for the benefit of the lunatic, would be to interfere with the jurisdiction of the Lord Chancellor, whose peculiar province it is to protect the persons and estates of lunatics. [Sir *John Cross*. Suppose this party, instead of a lunatic, had been an infant, when the power of attorney was given, might it not be considered to be an act done for his own benefit; and does not lunacy often come immediately in question before a court of law, as well as infancy?] Still, the Lord Chancellor is the sole judge of what is most beneficial for the interests of the lunatic. In the case cited from *Bell's Commentaries*, the power of attorney was legal in its inception. Here it was defective, *ab initio*. If an action had been brought against *Bright*, the other partner, by *J. H. Hermon*, could *Bright* have availed himself of the alleged assent of *Hermon* to release him, and to accept the bankrupt as a separate debtor? The question is, whether *Bright* was released by what took place at the dissolution of the partnership in June 1836, *Richard Hermon* having

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then no right whatever to act under any authority given him by *J. H. Hermon*, the power of attorney being then a perfect nullity. If that position is correct, there could have been no legal discharge of *Bright*. But even supposing the power of attorney to have been still in force, any promise of *Richard Hermon* to accept the bankrupt as his separate debtor, without any consideration for such promise, would, according to the decision in *Lodge v. Dicas*, be merely a *nudum pactum*. Mr. Justice *Holroyd* there observes, "In this case the plaintiffs gain no fresh security by having *Rondeau* as their debtor; and unless it could have been shown, that they were parties to the agreement between *Dicas* and *Rondeau*, there is no consideration whatever for the promise proved to have been made." That observation applies in every sense to the present case. Here the creditor gained no fresh security, by accepting the bankrupt as his separate debtor; nor was he any party to the agreement between the bankrupt and *Bright*, for the dissolution of their partnership. The case would have been different, if, instead of one partner retiring from the concern, a debtor takes in another person into partnership; for there, the acceptance of the two persons as his joint debtors would be a good consideration for his releasing the original debtor from his separate liability.

Mr. *Swanston* observed, that all the cases on this subject were considered in *Kirwan v. Kirwan* (a), where it was taken for granted, that the substitution of the liability of two partners for the liability of those two and a third, who had retired from the business, was a good consideration for the discharge of the third partner.

(a) 4 Tyr. 491.

Sir JOHN CROSS.—The question is of some importance, and I should therefore wish to look into the cases on the subject, before I deliver my judgment.

1839.

Ex parte  
BRADBURY  
and others.

Sir GEORGE ROSE.—I feel no difficulty on the point, and would therefore prefer expressing my opinion now, while the facts are fresh in my memory. The only question is, whether at the time of the dissolution of the partnership of *Walden and Bright*, there was any assent given by a party competent to give such assent, to accept the separate liability of the bankrupt for the debt, instead of the joint liability of *Walden and Bright*. Putting the power of attorney out of the question, it must be assumed, that the act of the committee of the lunatic was for the benefit of his estate; but I do not think that the validity of the power of attorney is impeached by the lunacy of *J. H. Hermon*. In my opinion, there was such a legal assent given to accept the separate liability of the bankrupt, as would amount in effect to a covenant not to sue the other partner.

Sir JOHN CROSS.—This is an application of assignees to expunge a proof for 2233*l.*, on the ground, that it is a joint debt of the bankrupt and another, formerly his partner in trade. November 26th.

It appears, that the bankrupt is the son in law of the creditor, and that the original debt was for money lent at different times to the partnership; and the creditor still holds their joint promissory note for a considerable part of it. That the partnership was dissolved long before the bankruptcy, but the bankrupt continued to carry on the business, retained all the partnership effects, and undertook to pay all the debts; and that a brother of

1839.

Ex parte  
BRADBURY  
and others.

the creditor, acting under a power of attorney from him, assented to that arrangement. A commission of lunacy issued against the creditor after the bankruptcy, and by the inquest he was found to have been a lunatic upwards of three years preceding, namely from the 1st July 1834, which was three days prior to the date of the power of attorney. His brother has been since duly appointed his committee for the management of his affairs, and in that character proved the debt in question.

The proof is objected to, *first*, on the ground, that the power of attorney was a nullity, as being the act of a lunatic; and *secondly*, that if the power was valid, still the debt had not become a separate debt of the bankrupt. In support of the first objection, it was insisted, that the inquisition was conclusive evidence of lunacy, at the time the power of attorney was executed by the creditor. But the case of *Sergison v. Sealey*, cited at the bar from 1 *Atk.*, is an express decision to the contrary. There it appears Lord *Hardwicke* held, that the inquisition was not conclusive, but only presumptive evidence. And although the inquisition in that case carried the lunacy back for a period of eight years, yet upon other evidence, he held the contract then in question valid, though made only two years before. So in the present case, I think the presumption arising from the inquisition is obviated by that which is furnished by the power of attorney, which was a sane, rational, and prudent act, no otherwise questioned; and I am therefore of opinion, that this objection is not sustained, in matter of fact. It has indeed been argued, that although the inquisition is not conclusive evidence against strangers, it is conclusive against the committee;



but there appears to me no ground whatever for that distinction.

In support of the second objection, as to the transfer of the debt, two cases, *Lodge v. Dicas* (a), and *David v. Ellice* (b), decided in the Court of King's Bench in the time of Lord *Tenterden*, are relied upon, as establishing that the transfer of a partnership debt to a continuing partner, with the consent of the creditor, is not binding upon the parties, without proof, that it was either to the prejudice of one party, or beneficial to the other. But those cases have been since over-ruled in the Court of King's Bench, and also in the Court of Exchequer, in the cases of *Thompson v. Perceval* (c), and *Kirwan v. Kirwan* (d). But the question is not in the present, as it was in all those cases, whether the retiring partner remains liable; but whether the continuing partner has not taken upon himself a separate liability, as a collateral security for the joint debt. Had he given a new promissory note, his separate liability would not, I believe, be disputed; and I see no real difference, in that respect, between such a note and a mere verbal promise to the same effect. The case of *Heath v. Percival*, as reported by *Strange*, 403, confirms this view of the subject; for there, on the bankruptcy of the continuing partner, the creditor was allowed, under similar circumstances, to take a dividend out of his estate, and afterwards to pursue his remedy against the retiring partner also. The only question at issue in the present case being, whether the proof ought to be expunged, it appears to me quite unnecessary to institute any further inquiry, whether it is for the benefit of the lunatic; as

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Ex parte  
BRADSHAW  
and others.

(a) 3 B. & Ald. 611.

(b) 5 B. & C. 196.

(c) 5 B. & Adol. 925.

(d) 4 Tyr. 491.

1839.

Ex parte  
BRADBURY  
and others.

we have the best authority for so considering it, in the fact, of its being made by the proper officer appointed by the Lord Chancellor for the management of his affairs.

I am of opinion, that the proof ought to stand, and that the petition must be dismissed with costs.

Petition dismissed, with costs.

Westminster,  
Nov. 23 and 25.  
Order made to  
change the di-  
rection of the  
fiat, under very  
special circum-  
stances.

In the matter of GRAHAM.

MR. SWANSTON applied, on behalf of the petitioning creditor, that the fiat might be directed to the Court of Bankruptcy in London, instead of to Commissioners at Sherborne in Dorsetshire, on an affidavit that a very great majority of the creditors in number and value, as well as the petitioning creditor, resided in London, and only an inconsiderable number at Sherborne.

Sir JOHN CROSS.—This is an application to change the venue, because a majority of the creditors live in London, and a minority in the country. I am always at a loss to conceive how the petitioning creditor obtains this information, in regard to the number and residence of the creditors. It can only be from the bankrupt himself; who probably wishes the fiat to be worked at a distance from the place where he carried on his trade, and where he is consequently best known. I do not think sufficient grounds have been stated, to induce the Court to depart from its ordinary rule.

Mr. *Swanston* this day renewed the application, on a fresh affidavit of the petitioning creditor, which stated, that he had obtained a list of the creditors from the bankrupt's wife, by which it appeared that all of them, except one, resided in London; that the bankrupt carried on the trade of a hawker; and that he and his wife had absconded from their usual residence; and that all the witnesses to prove the requisites to support the fiat also resided in London.

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In re  
GRAHAM.  
November 25th.

The COURT, upon this additional statement, supported by affidavit, made the

Order as prayed.

Ex parte SAMUEL KNOWLES.

THIS was also an application to change the venue of a fiat by directing it to London, instead of *Ilminster*, where it appeared the bankrupt had carried on the business of a silk throwster. It was stated in an affidavit in support of the application, that the debts of the creditors who resided in London amounted to 18,000*l.*; that all the silk bought by him for the purposes of manufacture was purchased in London, and that only one creditor of any consequence resided at *Ilminster*.

*Westminster*,  
November 25th.  
Venue refused to be changed to London, although creditors to the amount of 18,000*l.* resided there, and only one of importance in the place to which the fiat was directed.

Sir JOHN CROSS.—It appears from the affidavit, that the bankrupt must have been a trader in an extensive line of business. The deponent says, that he believes the fiat would be better executed in London; but I cannot agree with him in that belief. It does not appear,

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Ex parte  
KNOWLES.

that any effects to be administered are in London. On the contrary, we must presume that they are to be found where the bankrupt carried on his business.

Application refused.

Westminster,  
November 25th.

The appointment of a new trustee in the room of a bankrupt trustee, is quite a matter of course, if urged by the parties beneficially interested.

Ex parte SMITH and Wife.—In the matter of DRY.

THIS was the petition of a *cestui que trust*, and her husband, to appoint a new trustee in the room of the bankrupt, under the provisions of the 79th section of the 6 Geo. 4. c. 16.

Mr. Bird was in support of the petition.

Mr. Speed, *contra*, objected, that Mrs. Smith, being under age, ought to have appeared by her next friend. [Sir G. Rose. It is not necessary that a married woman, whose husband is joined with her in the petition, should petition by her next friend.] The Court has a discretionary power in removing a trustee who has become bankrupt, and it is submitted that, under the peculiar circumstances of this case, the bankrupt ought not to be removed. He obtained his certificate two years ago; all matters have been wound up under his bankruptcy, and he has continued to act as a trustee, without the slightest objection, up to September last, when he was called upon to execute a deed relating to the sale of some of the trust property. Upon that occasion, he inquired of the solicitor what was to be done with the purchase money; when the solicitor informed him that he was to receive that. This induced the trustee to refer to the trusts of the settlement, when he found it was expressly provided,

that the amount of the purchase money, for any property sold under the powers of the settlement, should be invested in the purchase of bank annuities. The trustee therefore said, that he would not execute the deed, unless that was done. It is only because the bankrupt wishes the trusts of the settlement to be faithfully performed, that the petitioners now apply for the appointment of a new trustee.

1839.

Ex parte  
SMITH

Mr. *Bird*, in reply, said that it was a matter of course, when a trustee became bankrupt, to appoint another in his room.

Sir JOHN CROSS.—I own I cannot discover any reasonable motive for the bankrupt's opposition to the wish of the parties beneficially interested, to appoint a new trustee; which appears to me quite a matter of course, under the provisions of the 79th section of the Bankrupt Act.

Sir GEORGE ROSE.—It must be referred to the Registrar, in the usual way, to approve of a proper person to be appointed trustee in the room of the bankrupt.

Common Order.

Ex parte FOREST.—In the matter of FOREST.

THIS was a petition of the bankrupt to annul the fiat, on the ground of an insufficient act of bankruptcy.

Westminster,  
November 25th.

Where a bankrupt presents a petition to annul the fiat, twelve months after it issued, without showing any good cause for the delay, his petition will be dismissed.

Mr. *Suanston*, in support of the petition, stated that

the delay, his petition will be dismissed.

1839.

Ex parte  
FOREST.

several purchasers of the bankrupt's property refused to complete their contracts, because they thought the fiat void; and that although this was not positively sworn to by affidavit, yet that he was instructed such was the fact. [Sir *John Cross*. This petition, I observe, is not presented until twelve months after the issuing of the fiat. Some reason ought to be alleged for this delay.] I am informed, that the bankrupt was ill for some time after the issuing of the fiat, and that he was not furnished with any knowledge of the particulars of the act of bankruptcy alleged to have been committed by him, until last September.

Mr. *Archbold*, and Mr. *K. Parker*, *contra*, relied upon affidavits which stated the acquiescence of the bankrupt in the fiat, by attending sales of the property, and personally interfering in the disposal of it.

Mr. *Swanston* said, that the bankrupt had had no opportunity of answering these affidavits, and ought not to be bound by them, without that opportunity.

Sir JOHN CROSS.—The first question is, whether the bankrupt has accounted for not coming sooner on his petition to annul the fiat. It is alleged, that he was for some time in a bad state of health, which prevented him from taking any steps for that purpose. But this allegation has been sufficiently answered by an affidavit, that the bankrupt interfered on many occasions in the disposal of the property, and appeared then in perfect health. If he was well enough to do that, it would follow that he was also well enough to present a petition to

this Court. As no good cause has been shown for the delay, I think the petition must be dismissed.

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Ex parte  
FOREST.

Sir GEORGE ROSE concurred.

Petition dismissed.

Ex parte THOMAS FIDGEON, EDWARD GETLEY, and HENRY LOMAS.—In the matter of THOMAS FIDGEON, EDWARD GETLEY, and HENRY LOMAS.

Westminster,  
Jan. 13th & 14th,  
1840.

Cor. Lord  
Chancellor.

THIS was an appeal from the decision of the Court of Review in *Ex parte Walker (a)*, on the following

The decision of the Court of Review in *Ex parte Walker*, 3 Deac. 672, confirmed on appeal to the Lord Chancellor.

SPECIAL CASE.

For some time previous to the month of January 1815, the above named *Henry Lomas* carried on the business of a merchant in Sheffield, and kept a banking account with *Thomas Walker*, deceased, *Richard Stanley*, deceased, and *Samuel Walker*, *Jonathan Walker*, *Vincent Henry Eyre*, and *Richard Stanley*, who then and for some time afterwards carried on the business of bankers in Sheffield aforesaid, under the firm of *Walkers, Eyre, and Stanley*.

In order to ascertain the terms on which a bond to secure advances is deposited with a creditor, the Court may have regard to external evidence, as well as the internal evidence of the bond itself.

In the early part of the year 1815, a partnership was formed between the said *Henry Lomas*, *Edward Getley*, and *Thomas Fidgeon*; which partnership was to commence as from the 1st of January 1815, and was carried on thenceforth to the month of May 1816, under the firm of *Henry Lomas & Co.*

The 32nd section of the Bankruptcy Court Act,—which provides that the order of the Court of Review shall be final, in determining any appeal touching any decision in matter of law, upon the whole merits of any

(a) *Ante*, 3rd vol. 672.

proof of debt, unless an appeal to the Lord Chancellor be lodged within one month from such determination,—is confined in its operation to *London* fiats. Therefore, where the appeal is from a decision of the Court of Review, on a question of proof under a *Country* fiat, the appellant is not limited to one month for lodging the appeal.

1840.

Ex parte  
FIDGSON  
and others.

The banking account, which had been so kept by the said *Henry Lomas* before the formation of the last-mentioned partnership, was continued by the said firm of *Henry Lomas & Co.* with the said firm of *Walkers, Eyre, and Stanley*, from the said 1st of January 1815, until the said month of May 1816, when the partners in the said firm of *Henry Lomas & Co.* became bankrupts. That account was kept by the said bankers in their books, as a continued running account; and money and bills to a large amount were from time to time paid into the banking-house of Messrs. *Walkers, Eyre, and Stanley*, by the said firm of *Henry Lomas & Co.*; and monies were from time to time drawn out by, and paid on the account of, the last-mentioned firm, and bills of exchange were received by the last-mentioned firm from the said firm of *Walkers, Eyre, and Stanley*; all of which were regularly entered to such account in the books of Messrs. *Walkers, Eyre, and Stanley*, to the credit, or to the debit, of the said firm of *Henry Lomas & Co.*; and such account was continued without any break or interruption, and a pass book was from time to time made up by the said bankers, and delivered to the said *Henry Lomas & Co.*, which contained a transcript of such accounts.

*Henry Lomas & Co.* being considerably indebted to Messrs. *Walker, Eyre, and Stanley* upon the said account, the latter firm required security; and a bond was prepared and executed, on or about the 26th of August 1815, by the said bankrupts, (*Thomas Fidgeon, Edward Getley, and Henry Lomas*), and by *William Fidgeon*, as their surety, which bond was in the terms following (that is to say):—

“ Know all men by these presents, that we, *Thomas Fidgeon*, of Birmingham, in the county of Warwick



merchant, *Edward Getley*, of Moseley, in the parish of King's Norton, in the county of Worcester, merchant, *Henry Lomas*, of Sheffield, in the county of York, merchant, and *William Fidgeon*, of Wilnecote, in the county of Warwick, farmer, are jointly and severally held and firmly bound to *Thomas Walker*, of Berry Hill, in the parish of Mansfield, in the county of Nottingham, *Samuel Walker*, of Aldwark, in the parish of Ecclesfield, in the said county of York, *Jonathan Walker*, of Ferham, in the parish of Rotherham, in the said county of York, *Vincent Eyre*, of Highfield, near Chesterfield, in the county of Derby, and *Richard Stanley*, of Barber Wood, in the parish of Rotherham aforesaid, bankers, and partners, in the sum of 20,000*l.* of good and lawful English money, to be paid to the said *Thomas Walker*, *Samuel Walker*, *Jonathan Walker*, *Vincent Eyre* and *Richard Stanley*, or any of them, or their certain attorney, their executors, administrators, or assigns; for which payment, to be well and faithfully made, we bind ourselves, jointly and severally, and each and every of us, by himself, for the whole and every part thereof, our and each and every of our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals, dated this 26th day of August, in the fiftyfifth year of the reign of our Sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, and in the year of our Lord, 1815.

"The condition of this obligation is such, that if the above bounden *Thomas Fidgeon*, *Edward Getley*, *Henry Lomas*, and *William Fidgeon*, or some or one of them, their or some or one of their executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above-named *Thomas Walker*, *Samuel*

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*Walker, Jonathan Walker, Vincent Eyre, and Richard Stanley*, or any of them, their executors, administrators, or assigns, the full sum of 10,000*l.* of lawful money of the United Kingdom of Great Britain and Ireland, current in England, upon demand, together with full lawful interest for the same from the date hereof, of like lawful money, without any deduction or abatement whatsoever (except for the property tax as required by law), and without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue."

It was the practice of the said Messrs. *Walkers, Eyre, and Stanley* to carry to the credit of the said firm of *Henry Lomas & Co.*, in their said account, the amount of all bills which were paid into the said banking house by the last-mentioned firm; and, on the day of the date of the bond, the total amount of the sums standing upon the said account in the books of the said Messrs. *Walkers, Eyre, and Stanley*, to the debit of the said firm of *Henry Lomas & Co.*, was 151,763*l.* 12*s.* 10*d.*; and the total amount of the sums then standing upon the same account in the same books to the credit of the said firm of *Henry Lomas & Co.*, was 149,387*l.* 15*s.* 8*d.*; leaving an apparent balance of 2375*l.* 17*s.* 2*d.* due from the said firm of *Henry Lomas & Co.* to the said firm of *Walkers, Eyre, and Stanley*.

The total amount of undue bills which had been drawn, accepted, or indorsed by the said firm of *Henry Lomas & Co.*, and which had been placed to their credit in the said account in manner aforesaid, was, on the day of the date of the bond, 44,596*l.* 2*s.* 3*d.*, and which sum formed a part of the said sum of 149,387*l.* 15*s.* 8*d.*; so that if the said sum of 44,596*l.* 2*s.* 3*d.* had been deducted from the said sum of 149,387*l.* 15*s.* 8*d.*, the actual balance which

would then have been due from *Henry Lomas & Co.* to *Walkers, Eyre, and Stanley*, on the said 26th day of August 1815, would have been 46,971*l.* 19*s.* 5*d.* and not the before-mentioned sum of 2,375*l.* 17*s.* 2*d.* only.

After the 26th day of August 1815, Messrs. *Walkers, Eyre, and Stanley* received in respect of the said undue bills of exchange (amounting to 44,596*l.* 2*s.* 3*d.*), which on the day last-mentioned were standing as aforesaid to the credit of the said *Henry Lomas & Co.*, sums amounting in the whole to 39,538*l.* 2*s.* 3*d.*; and the said Messrs. *Walkers, Eyre, and Stanley* also received from the said *Henry Lomas & Co.*, after the said 26th of August 1815, divers other monies and bills of exchange amounting together to 25,655*l.* 5*s.* 3*d.*; all of which were entered in the said account in the books of the said Messrs. *Walkers & Co.* to the credit of *Henry Lomas & Co.*, and of the last-mentioned amount the said Messrs. *Walkers, Eyre, and Stanley* received sums of money amounting in the whole to 13,468*l.* 3*s.* 3*d.*; and thereby the said *Thomas Fidgeon, Edward Getley, and Henry Lomas*, did pay, or cause to be paid, to the said *Thomas Walker, Samuel Walker, Jonathan Walker, Vincent Henry Eyre, and Richard Stanley*, or one of them, sums exceeding the full sum of 10,000*l.* with lawful interest thereon, from the 26th day of August 1815.

Shortly after the date and execution of the said bond of the 26th August 1815, the said *Thomas Fidgeon* left England and went to reside in Germany, where he remained until about the date of the commission of bankruptcy hereinafter mentioned.

The said *William Fidgeon* died intestate, on or about the 3d May 1816, leaving the said *Thomas Fidgeon* his heir-at-law. Whereupon the real estates of the said

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*William Fidgeon* descended upon, and became vested in, the said *Thomas Fidgeon*, subject to the specialty debts of the said *William Fidgeon*.

On the 30th May 1816, a commission of bankrupt was issued against the said *Henry Lomas*, *Edward Getley*, and *Thomas Fidgeon*, who were duly found and declared bankrupt under the same; and *John Hardman*, and *Thomas Cooke*, and *Peter Kempson*, (both since deceased), were duly appointed assignees of the estate and effects of the said bankrupts under the said commission, and the usual assignment of the personal estate of the said bankrupts, and the usual bargain and sale of their freehold estates, were executed to the said assignees by the major part of the Commissioners named in such commission; and thereby the freehold estates of the said *William Fidgeon* became vested in the said assignees, but subject to the said specialty debts of the said *William Fidgeon*.

On the 4th July 1816, the said Messrs. *Walkers*, *Eyre*, and *Stanley* claimed under the said bankruptcy the sum of 28,802*l.* 11*s.* 1*d.*, as a debt due upon the balance of account, and for money paid and advanced to and for the use of the said bankrupts; and such claim was admitted.

On the 20th August 1816, the said *Richard Stanley*, on behalf of the said Messrs. *Walkers*, *Eyre*, and *Stanley*, proved under the said bankruptcy, against the joint estate of the above-named bankrupts, a sum of 7,421*l.* 14*s.* 8*d.*, as a debt due to the said Messrs. *Walkers*, *Eyre*, and *Stanley*, for money lent, advanced, and paid by them unto and for the use of the said bankrupts before the date of the said commission, and for lawful interest upon such money, which accrued due before the date of the said commission, and for customary bankers' com-

mission for business transacted for the said bankrupts before the date of the said commission, over and besides the sum of 10,000*l.*, alleged to be secured by the said bond.

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On the 3d July 1816, the said Messrs. *Walkers, Eyre, and Stanley*, on behalf of themselves and all other the creditors of the said *William Fidgeon* deceased, filed a bill in the Court of Chancery against the said assignees, and against *Samuel Cave Fidgeon*, the legal personal representative of the said *William Fidgeon*, for the purpose of compelling satisfaction out of his estate of the amount of the said bond of the 26th August 1815, and of the interest alleged to be due thereon. Various proceedings were heard in that cause; and ultimately the Master, by a report made in the said cause, and dated the 16th December 1837, found that 10,000*l.* and interest had been received by the said plaintiffs, from or on account of the said *Henry Lomas & Co.*, since the date of the said bond; and that he was of opinion, that nothing, at the date of the said report, remained due upon the said bond. The report of the said Master was duly confirmed; and by an Order of the same Court, dated the 1st May 1838, the bill was dismissed, so far as the same sought to establish the claim of the plaintiffs, as specialty creditors of the said *William Fidgeon* on the bond.

On or about the 11th October 1827, a renewed commission of bankruptcy of that date was issued against the said *Thomas Fidgeon, Edward Getley, and Henry Lomas*; and on or about the 4th February 1839, a renewed fiat in bankruptcy of that date was issued against the said *Thomas Fidgeon, Edward Getley, and Henry Lomas*; and at a meeting appointed by the Commis-

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sioners acting under the said renewed fiat, for the proof of debts thereunder, and held on the 22d February 1839, the said *Samuel Walker*, *Jonathan Walker*, and *Vincent Henry Eyre*, the only surviving partners of the said firm of Messrs. *Walkers, Eyre*, and *Stanley*, attended by their solicitor, in order to prove the said sum of 10,341*l.* 10*s.*, being the amount of the principal sum alleged to be secured by the said bond, with interest thereon to the date of the said commission, against the separate estate of the said *Thomas Fidgeon*. And the said *Samuel Walker*, *Jonathan Walker*, and *Vincent Henry Eyre* then and there tendered to the said Commissioners a form of proof for the said sum of 10,341*l.* 10*s.*, as a debt due to them, as such surviving partners as aforesaid, from the separate estate of the said *Thomas Fidgeon*; when the said Commissioners rejected such proof. Whereupon the said *Samuel Walker*, *Jonathan Walker*, and *Vincent Henry Eyre*, on or about the 12th April 1839, presented their petition to the Court of Review, praying that the said Commissioners might be directed to permit them to prove the said sum of 10,341*l.* 10*s.*, as a debt due to them from the separate estate of the said *Thomas Fidgeon*, and to receive dividends on such proof rateably with the other separate creditors of the said *Thomas Fidgeon*; and that in the mean time the said Commissioners might be directed not to declare, and that the said assignees might be restrained from paying, any dividends or dividend on the separate estate of the said *Thomas Fidgeon*, or on the joint estate of the said bankrupts.

The said petition came on to be heard before their Honors the Judges of the Court of Review, on the 10th June 1839; and by an Order of that date, after reciting the said petition, and the prayer thereof upon hearing

the said petition, and the affidavits filed in support thereof, and the several exhibits therein mentioned, and the affidavits filed in opposition to the said petition read, and what was alleged by the counsel for the said petitioners, and for the respondents, the assignees; it was declared, that the said bond of the 26th August 1815, mentioned in the said petition, was a security for the continuing balance of the banking account between the said *Thomas Fidgeon*, *Edward Getley*, and *Henry Lomas*, and Messrs. *Walkers*, *Eyre*, and *Stanley* in the petition mentioned; and did order that the said petitioners should be at liberty to go in under the fiat, in the said petition mentioned to have been awarded and issued against the said bankrupts, and prove against the separate estate of the said bankrupt *Thomas Fidgeon* such amount as they should establish to be due to them by virtue of the said bond, in respect of such balance; and that the said petitioners should be paid dividends on the amount of what they should so prove, rateably and in equal proportion with the rest of the separate creditors of the said bankrupt *Thomas Fidgeon*, seeking relief under the said fiat; not disturbing any dividend of such separate estate already made thereunder. And it was ordered, that the costs of the said petitioners and assignees, of and occasioned by their said application, should be paid to them respectively, or to their respective solicitors, out of the separate estate of the said *Thomas Fidgeon*; the petitioner's costs being first taxed and ascertained by *Francis Gregg*, Esq., an officer of this Court; and that the costs of the said assignees should be taxed by the Commissioners.

The question at issue between these parties, on the hearing of the petition, was,—whether, in fact, the bond

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was delivered and accepted, for the purpose of securing all past and future advances made by the bankers on the banking account current ; or only for securing the then existing debt. It appeared to the Court, from the proof adduced on the hearing, that the amount of the bond, at the time of its original execution, far exceeded that of the then actual debt, exclusive of liabilities. That after such debt had been fully satisfied, the bond was re-executed, and again deposited with the bankers. And the Court did further find, that large sums of money were afterwards applied for, and advanced, on the credit of this bond. And it was alleged, on behalf of the petitioners, that the bond was given and accepted as a continuing security. But it was objected, on the part of the assignees, that the bond was a satisfied security ; and that the Court was precluded by the rules of evidence, from finding the intent and purpose for which it was deposited with the bankers, by any evidence not apparent on the face of the bond itself, which contained no such evidence. The Court over-ruled the objection ; and having regard as well to the external, as the internal, evidence of the bond, found and adjudged, that, in fact, the bond was delivered and accepted, for the purpose of securing all past and future advances made, or to be made, to the bankrupts, on the account current, and was still in force, as a continuing security against them. The learned counsel for the assignees insist, that the said judgment is erroneous in matter of law, in this, that it is not founded wholly on the internal evidence of the bond, but also upon external evidence, which ought to have been wholly disregarded ; and therefore, that the said order and decree ought to be reversed.



Mr. *Knight Bruce*, Mr. *Jacob*, Mr. *J. Russell* (Mr. *Whately*, and Mr. *Bacon*, were also with them), appeared in support of the appeal.

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Mr. *Swanston*, for the respondent, took a preliminary objection to the hearing of the appeal, on the ground that the requisition of the 32nd section of the Bankruptcy Court Act (1 & 2 Will. 4. c. 56.) had not been complied with. That section provides, that "if the Court of Review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination." In the present case, the month had expired before the appeal was lodged. Consequently, the appeal is too late, and cannot now be heard.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *J. Russell*. The limitation of the 32nd section only applies to the proceedings under *London*, and not to Country, fiats. This is clear, from a careful examination of the previous sections of the act. The 2nd section of the act transfers the jurisdiction over all matters of bankruptcy, whether arising in the Court of Bankruptcy, or *elsewhere*, to the Court of Review, except as is in the act afterwards provided. By this section, therefore, the Court of Review has a general jurisdiction over the proceedings both of London and country fiats; which jurisdiction is only qualified afterwards, as to the proceedings under *London* fiats, in the case of an appeal from a Commissioner of the Court of Bankruptcy, or a

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Subdivision Court, upon a question relating to the proof of debt. The 3rd section declares, that all matters in bankruptcy are to be heard and determined in the Court of Review, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the report or admission of evidence only. It then provides, that in all cases of appeal to the Lord Chancellor, the appeal shall be on a special case, certified by one of the Judges of the Court, unless the Lord Chancellor shall otherwise direct, and that the appeal shall be only heard by the Lord Chancellor, and not by any other Judge of the Court of Chancery. There is therefore no limitation whatever, as to any certain time for appealing, contained in this section; such limitation being only to be found in a distant part of the act relating to proceedings before a London Commissioner. The 30th and 31st sections of the act define the powers and jurisdiction of the Commissioners of the Court of Bankruptcy, which are only applicable to the proceedings under *London* fiats. The 31st section provides, "that if such *Commissioner* (not *Commissioners*, in the plural, which might then be supposed to apply to country fiats) or Subdivision Court, shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under review of the Court of Review by the party who thinks himself aggrieved, &c.; and in like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor." Then the 32nd section, which continues the provisions as to such appeal upon the question of any proof of debt, declares that the order of the Court of Review shall finally determine the question as to the

said proof, unless an appeal to the Lord Chancellor is lodged within a month from such determination; and it adds, that if the appeal shall be allowed, "then and in that case the proof of the debt shall be again heard by the *Commissioner* (not *Commissioners*), or Subdivision Court." It is plain, therefore, that these sections refer exclusively to the proceedings before a Commissioner of the Court of Bankruptcy, or a Subdivision Court, before which tribunal the *London* fiats alone are worked; neither the one, nor the other, having any jurisdiction over country fiats. The question is, whether the *expressio unius*, as to appeals from a *London* Commissioner, in matters concerning the proof of debts, is to exclude the general provisions of the 2nd and 3rd sections. A marked distinction is also made in various provisions of the act between the prosecution of London and country fiats. Thus, the 13th section declares, that every fiat prosecuted *in the Court of Bankruptcy*, shall be filed and entered of record; but it makes no such provision for fiats prosecuted elsewhere. So, again, the 30th section declares, that any one of the six Commissioners of the Court of Bankruptcy may adjourn the examination of a bankrupt, or other person, to be taken either before a Subdivision Court, or the Court of Review; but there is no such power given to any of the country Commissioners. In like manner, the two following sections, the 31st and 32nd, as has been already observed, are confined wholly to proceedings before a *London* Commissioner, or a Subdivision Court. It is evident, therefore, that the 32nd section was never intended to include within its provisions any regulation respecting appeals from the decisions of the country Commissioners. A

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similar objection was raised in *Ex parte Jackson* (a), which appears to have been over-ruled by the Court of Review.

Mr. *Swanston*, in reply. The word "appeal," in the 32nd section is not to receive the technical and exclusive sense that has been contended for; nor is any distinction made in that section between the proceedings under London and country fiats, as to the limitation of appeal. In *Ex parte Jackson*, which has been cited by the other side, the objection raised was not as to the right of appeal, but as to a re-hearing of the petition six months after the previous hearing; which, it was contended, would let in the right of appeal from the decision of the Court of Review on such re-hearing, although the party was estopped by his own laches from appealing against the decision on the previous hearing; and the judgment of the Court in that case in no way controverted the position, that there is no right of appeal, unless the appeal is lodged within one month after the determination of the question by the Court of Review.

Lord COTTENHAM, C.—I have no doubt in deciding upon this objection. The act of parliament, that has been referred to, leaves all proceedings under country fiats the same as they were before the passing of the act. The 31st and 32nd sections speak only of the *Commissioner* (in the singular number) or the Subdivision Court, and are confined to the right of appeal in the case of any disputed debt, or upon the merits of any proof of debt. The words used in both sections,

(a) 3 Dea. 651.

"Commissioner, or Subdivision Court," show plainly that the provisions of those sections relate only to the *London* jurisdiction. The two clauses must be considered to be *in pari materiâ*, extending only to the proceedings under *London* fiats. The objection therefore must be overruled.

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Mr. Knight Bruce, Mr. Jacob, and Mr. J. Russell, then proceeded on the merits. The debt that is claimed to be proved against the separate estate of *Thomas Fidgeon*, was for advances made to the partnership of *Fidgeon, Getley, and Lomas*. This debt, but for the bond set forth in the special case, would be a joint debt owing by *Fidgeon, Getley, and Lomas*. The Court of Review has completely changed the nature of the security. The report of the Master, referred to in the special case, states that the bond was given for an existing debt, which was satisfied, and that nothing was due on the bond. [The *Lord Chancellor*. The facts stated in the special case are, that the bond was given expressly for a running balance.] It is a great hardship on the appellants, that one of the most material points affecting this case, namely, the point as to the appropriation of payments, is not alluded to in the special case, although it must have been urged in the argument before the Court of Review. We say, that the bond was satisfied by one of the obligors, and was therefore no longer an existing security binding on the others. In *Jones v. David* (a) it was decided, that if one of two joint obligors pay off a debt, he is only a simple contract creditor of the principal debtor. In that case, the surety, after the death of the principal, paid the bond, and took an assignment of it from the obligee; but it was

(a) 4 Russ. 277.

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held to be too late, for that the bond was paid and gone. [The *Lord Chancellor*. You cannot contend in this case, that the bond has been paid, when it has never been considered to be paid, either by debtor, or creditor. It is not, because the surety has a right to say that the bond is to be considered to be paid, as against him,—on the ground that he was not a party to the subsequent agreement between the other obligors and the obligee,—that it is to be considered as paid by the principal obligor.] From the statement in the special case, we submit that the bond must be considered as paid. The special case states, that in the former suit between the same parties, at the date of the report of the Master, nothing was due upon the bond,—not, that nothing was due from any one of the obligors, but that nothing was due on the bond. We submit, therefore, that any of the obligors could, in an action at law, brought against him by the obligee, have pleaded *solvit post diem*. Sir *John Cross*, in the judgment delivered by him on the hearing of the case in the Court below, gives no opinion whether the bond was an available bond, or not, at law, or whether it was, or was not, extinguished by payment. The decision in *Ex parte King* (a) shows, that before proof can be admitted on a bond, the condition must be previously broken. In the present case, the bond was for the payment of 10,000*l.* and interest; the moment, therefore, that the 10,000*l.* was paid, the bond was discharged.

Mr. *Swanston*, Mr. *Wigram*, and Mr. *Goldsmid*, for the respondents, were stopped by the Court.

Lord COTTENHAM, C.—I am bound, by the 37th sec-

(a) 7 Ves. 304.

tion of the Bankruptcy Court Act, to confine myself to the special case as stated by the Court below. Now a very small portion of the argument that has been addressed to me has any reference to the case; it has travelled entirely out of the case; an attempt has been made, indeed, to raise difficulties, but not on anything which has been reported to me from the Court below. The question, and the only question, I have to consider is, the point, as to the admissibility of the evidence received by the Court of Review; and the case states it in these very distinct terms. (His lordship here read the concluding statement in the special case, for which see *ante*, p. 226.) It is there stated to me, as a fact, that regard being had to the external, as well as the internal, evidence, the bond was delivered and accepted for the purpose of securing all past and future advances made, or to be made, to the bankrupts on the account current, and is still in force as a continuing security against them. That is a fact found. Now, I have no power or jurisdiction over that point, nor have I the means, or the right, to inquire into the accuracy of that finding. The law makes that conclusive, and my judgment can only be exercised on that, which the Court states to be a fact. It states the point, and the only point, for my consideration to be a mere question of evidence, viz. whether it was consistent with the rules of law, in order to ascertain for what purpose the bond was deposited, to look at the external evidence, as well as the internal evidence of the bond.

Now, it was said, that the case did not accurately represent the points which were raised in the Court of Review; but no very substantial objection was made to it: indeed, if any such objection had been made, I am

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not competent to correct it; nor have I anything before me now, by which I can do otherwise than deal with the case as stated by the Court of Review. But I have referred to the printed report of the case in 3 *Deacon's* Rep. 672; and, on looking at it, I think the special case does ample justice to the argument, as there reported; that may also be there misrepresented, for anything I know; but undoubtedly the learned counsel have been unfortunate, if not only the learned judge misunderstood their argument, but the learned reporter too; for I can find nothing stated in the printed report of the case, but exactly that proposition which is stated in the special case, as settled by the learned judge of the Court of Review. The argument of the counsel for the respondents is thus given. "Mr. *Whately*, and Mr. *Russell*, for the assignees. There is no such ambiguity in the wording of the bond or condition in this case, as to admit the reception of any parol evidence to explain its meaning; parol evidence may be given to explain an ambiguous term, or act, but not to add to the effect. We say, the bond was given for a present debt owing from the bankrupts to the petitioners at the date of the bond, and that that debt has since been paid. This view of the case was taken by Sir *John Leach*, when Vice Chancellor, in delivering his judgment on the hearing of the exceptions to the Master's report." Then there is a long passage quoted from Sir *John Leach's* judgment, and then the counsel proceed. "Now, if the bond imported a present debt against one of the obligors, it imported a present debt against all. The House of Lords then having decided that it was given for a present debt, as against the surety, it must be for a present debt as against the bankrupts, the three other obligors,"



that is, that the bond itself purports to be for a present debt. This is the substance, therefore, of the argument of the learned counsel: It is not competent to go into evidence, to see for what purpose the bond is deposited; you can only judge of the purpose by the terms of the bond itself; and those terms do not show anything indicating security for a future debt. That is the whole of the case presented to the Court of Review, as far as the reporter can be trusted; it is also the whole of the case, as represented by the statement of the learned judge to me. I have no right to refer to any evidence, even to the Report, for the purpose of seeing what the argument was. I am bound by the statement of the case. But, when a case of hardship is represented, as if the judge had not given proper weight to some argument urged before the Court of Review, it is satisfactory to see, from the printed report, that there is no misapprehension on the part of the learned judge; but that the whole of the argument urged before that Court has been accurately represented in the case presented to me.

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There would be no necessity for saying anything further on the subject, because I am bound within the limits of the special case; I cannot go out of it; but it may be satisfactory to the parties to know, that it is my opinion, even if I had the liberty to go out of the case, that I should come precisely to the same conclusion, as that of the Court of Review.

The whole argument here rests on the decision of the House of Lords in the case of *Walker v. Hardman* (a): but it will be seen how totally untenable the argument is, consistently with the ground on which that case was decided.

(a) 11 Bligh, 266.

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There the case was against *William Fidgeon*, the surety. We have nothing to do with *William Fidgeon* here; and the whole argument is concluded; because, if we had no *William Fidgeon* in the case, and if there had been no proceedings at all against *William Fidgeon*, I take it for granted that there could be no question raised. The only question therefore is, whether what has taken place, with regard to *William Fidgeon*, varies the case at all; and whether it was in the contemplation of those who decided the case in the House of Lords, that by any possibility that decision should operate in favour of the obligor, who was the original debtor. *William Fidgeon* was not originally a party to the transaction; he came in as a surety, and the ground on which he escaped the liability was this, that all which is found as a fact in this case, viz. the agreement between the parties,—the understanding,—the deposit on the one side, and the acceptance of that deposit on the other, which is equivalent to a contract that the bond should be a security for a continuing or running balance,—was an arrangement or understanding between the debtor and creditor, with which *William Fidgeon* had nothing to do. Upon that, the Vice-Chancellor first, and Lord Brougham, and the House of Lords, ultimately, said, you cannot affect *William Fidgeon* by any consequences of this arrangement, or understanding; because he only became party to an instrument, which on the face of it does not import any such balance. You can only construe his liability, according to that to which he has put his name; he was a party to the bond, and he is bound, as far as he has contracted; but the bond does not import, on the face of it, any security for a future debt; and therefore, *quoad* him, you cannot pursue the security further. It never was

intended by those who decided that case, to say, that the original debtor was discharged; and throughout, if attention is paid to the observations of Lord Lyndhurst, who took the principal part in the discussion of the case in the House of Lords, it will be seen that he draws this distinction in every observation he makes; and that the only ground of that decision was, that *William Fidgeon* was discharged,—not because there was no such contract, as to a future debt, between the principal debtor and creditor,—but because he was no party to that arrangement.

Now, the Master's report has been referred to, not the dismissal of the bill, for that the learned counsel properly admitted would amount to nothing; because you cannot tell why a bill is dismissed. It is true, that the dismissal in any case, where there is no reservation of liberty to file another bill, protects the party in whose behalf the bill is dismissed, who was here the principal defendant; yet you cannot assume any fact from that dismissal, because you do not know the ground on which it took place. But the Master's report does not, as it has been supposed throughout this argument, find *payment*; no such word whatever is to be found in it; but it is a report quite consistent with the real state of the case. The report finds this—the very point on which the Court of Review has founded its judgment—namely, that the security was deposited, for the purpose of securing future advances and future liabilities. If therefore you refer to the report, at least you have this fact established, which cannot be questioned here, that the deposit was for the purpose of securing future advances. What does the report find? not any *payment*, but that, as between the parties there in contest, nothing was due on the bond. Suppose the surety had been released by any of those

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acts which we know release sureties, there would have been then, no doubt, nothing due on the bond, as against *William Fidgeon*. But even if the word *payment* had been used, in that case the argument could only be founded on the legal consequences affecting other persons, from the incidental use of an inaccurate term in the Master's report. *Payment* there is none, there could be none;—who are the parties to pay? The debtors were to pay to the creditors; the creditors are the bankers, the debtors are the persons between whom and the bankers the account existed; and there is no pretence for saying there is any payment as between them. The moment you establish the fact, therefore, that the bond was not a security for an existing debt, but a security for some other debt which might thereafter appear to be due, no intermediate money transaction can have any reference to the bond; and therefore no intermediate money transaction can be payment on the bond. It may be, that the intermediate money transaction may release the surety from payment, beyond all doubt; but *payment*, in the proper sense of the word, cannot properly take place; because it is not within the scope or purpose, for which the security was deposited. There is no such word used in the Master's report; and if there had been, it would have been perfectly immaterial; because, the nature of the transaction being stated in the report, it would be obvious what the meaning of the master was, if he had used that term. We know very well, that dealing with a principal may very often release a surety; but here the question is, whether this sort of absence of dealing with the surety is to discharge the principal.

In this case, the debtors, in order to secure an existing

debt, and having a continuance of money transactions with the party with whom they are dealing, execute and deposit a joint and several bond, (so the case finds), to secure future advances, and any ultimate balance. The transactions go on, and at the end and close of the transactions, a balance is found due; and the party, having the benefit of the bond, now only seeks to do that which the security gave him a right to do, namely, to establish that as a debt against the party, who has made himself separately liable by his bond for such balance as might eventually become due.

Those are the facts found by the Master's report; the special case states the same facts as are found by the report; and of the real transaction between the parties, neither the one proceeding, nor the other, leaves the slightest doubt.

There is nothing in the transaction,—on the ground of which the surety has been exonerated from his liability,—which can affect here the liability of the principal debtor, and I am of opinion, there is no question in form raised for any such consideration. It is impossible to be argued, that, with respect to any security deposited for the purpose of securing an ultimate balance, you cannot go into evidence to show the purpose for which it was deposited. The same attempt was made in the argument before the House of Lords, and Lord Lyndhurst meets it in this way: "This instrument does not, on the face of it, state, that it is a guarantee; you must, therefore, call evidence to show that it is; and may not that evidence also show for what it is a guarantee? In all the cases referred to in the argument, the guarantee is on the face of the instrument itself; here it is meant to be a security; a simple bond, meant to be a security for something that must

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be proved by evidence; therefore you may have evidence to show for what it is a security." However, the counsel have very properly abstained from arguing here so untenable a point, as what they were, I believe, seduced by the observations of Sir *John Leach* to argue in the Court below, and which I think was properly overruled by the Court of Review,—namely, that the bankers were not at liberty to go into evidence, for the purpose of showing for what purpose this money bond was deposited. That, in fact, is the only point brought to me for consideration.

I have gone into the other parts of the case, not because they were in the least open to me, but that the parties may be satisfied that they have not lost any benefit by any omission, either of the counsel, or the learned judge who stated the case. If I had the same jurisdiction over the case, which the Court of Review had when the case came before them, I should not have had the slightest doubt in pronouncing the same judgment. The appeal must therefore be dismissed, with costs.

Ex parte CHARLES WALMSLEY.—In the matter of  
JAMES OGDEN and CHARLES WALMSLEY.

Serjeants' Inn,  
August 11th.  
Cor. Sir J. Cross.

Where one of two bankrupts under a joint fiat dies, without having made any affidavit of his conformity, and the surviving bankrupt applies for the allowance of the joint certificate,

the order can only be made for its allowance as to the surviving bankrupt, reserving for further consideration the question as to the allowance to the deceased bankrupt.

THIS was a petition of the bankrupt *Charles Walmsley*, for the allowance of his certificate. It appeared, that a joint fiat had issued against both bankrupts, and that on the 6th July 1840, the commissioners signed the certificate of both the bankrupts, which was also signed by the proper proportion of creditors in number and value;

but that, the bankrupt *James Ogden* died on the 24th of June 1840, without having made any affidavit of his conformity. The petitioner, however, had made an affidavit that he and his deceased partner had in all things conformed themselves, and that the certificate was obtained fairly and without fraud; and he prayed, that the decease of *James Ogden*, his late partner, should not be allowed to prejudice or affect the allowance and confirmation of the certificate.

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Mr. *Deacon*, in support of the petitioner, said, that as the other bankrupt, *James Ogden*, had died before he had made any affidavit of conformity, the Court perhaps would be guided by the Order made by Lord *Eldon*, in *Ex parte Cossart* (a), which was in all respects a parallel case with the present.

Sir JOHN CROSS, after conferring with Mr. *Barber*, the Registrar, thought that that precedent should be observed in this case, and made the following

ORDER, that inasmuch as no affidavit of conformity, as required by the statute, had been made by the deceased bankrupt during his life-time, the certificate be advertised as to *Charles Walmsley* alone; and that the further consideration of the subject-matter of the said certificate, as to the deceased bankrupt, do for the present stand over (b).

(a) 1 G. & J. 248.

(b) See *Ex parte Currie*, 10 Ves. 51; *Bromley v. Goodere*, 1 Atk. 77; *Tudway v. Brown*, 2 Burr. 719; per *Ld. M.*

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Jan. 15, 22, 27.

Where on a petition of an equitable mortgage for a sale, it was alleged that the deed was deposited by a party "acting as the solicitor of the bankrupt," this was held not a sufficient allegation of any actual authority given by the bankrupt to deposit the deed.

Although the petitioner refuses to submit to the jurisdiction of the Court, in case it should make an adverse order against him on a point arising out of, but not directly brought before the Court by, his petition, the respondent cannot object to the further hearing of the petition.

Ex parte CHARLES COLEMAN.—In the matter of JOHN LIONEL HOOD.

**THIS** was the petition of a creditor claiming a lien on an annuity granted to the bankrupt, and praying that the annuity might be sold in satisfaction of his debt.

It appeared, that the petitioner, at the request of the bankrupt, had discounted a bill of exchange for the sum of 500*l.*, dated the 2nd May 1837, and payable three months after date; which bill was drawn upon the bankrupt by Mr. *Frederick Lock*, then a partner in the firm of *Lock, Smith, & Allison*, of Cornhill, London, solicitors, and which bill was duly accepted by the bankrupt, and indorsed to the petitioner. On the 5th May 1837, *Fredrick Lock* called on the petitioner, and requested, on behalf of the bankrupt, that the petitioner would advance a further sum of 500*l.* to the bankrupt, by way of discount of a further bill for the like period of three months, as a temporary loan; which the petitioner agreed to do, and then and there advanced and paid to *Frederick Lock*, on behalf of the bankrupt, the further sum of 500*l.*, *minus* the discount thereon for a period of three months, at the rate of 10*l.* per cent. per annum. When these two bills of exchange became due, they were not paid; and on the 14th December following *Frederick Lock* brought to the petitioner a bill of exchange dated on that day, drawn by himself and accepted by the bankrupt for the sum of 1500*l.*, payable three months after date, by way of security for the monies advanced to him; which the petitioner declined to receive as security, but, on being pressed, agreed to take it to the extent of 1000*l.*, as a renewal of the two former bills, and gave *Frederick Lock* a written memo-



randum that only 1000*l.* of the bill belonged to the petitioner; and the same bill was duly indorsed to the petitioner by *Frederick Lock*. The petition then stated, that at the latter end of February 1838, which was some time before the last-mentioned bill became due, *Frederick Lock*, acting as the solicitor, and on behalf of the bankrupt, brought to the petitioner a certain indenture bearing date the 16th March 1830, and made between *Maximilian Richard Kymer*, therein described, of the one part, and the bankrupt of the other part; whereby, after reciting that *M. R. Kymer* was entitled to an annuity of 515*l.* chargeable upon and issuing out of certain salt works, known by the name of the Wharton Patent Salt Works; and that the bankrupt had contracted and agreed with *M. R. Kymer* for the purchase of the annual sum of 100*l.*, part and parcel of the said annuity of 515*l.*, at or for the price or sum of 999*l.*; it was witnessed, that in pursuance of the said agreement, and in consideration of the said sum of 999*l.*, *M. R. Kymer* assigned and transferred to the bankrupt the annual sum of 100*l.*, part and parcel of the said annuity of 515*l.*, to hold the same for the residue of a term of ninety-nine years, subject nevertheless to a power contained in the indenture for redemption of the annuity. This indenture was deposited with the petitioner by Mr. *Lock*, as a security to the petitioner, in case the sum of 1000*l.* secured by the last-mentioned bill of exchange, should not be paid. Before the bill became due, the bankrupt and *Frederick Lock* requested the petitioner to renew the same; which he accordingly did three several times, the last renewed bill bearing date the 15th December last, and being drawn by *Frederick Lock* upon and accepted by the bankrupt.

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The petitioner alleged, that he did not, when the deposit was made of the annuity deed, in any manner contract or agree that he would renew the bill then held by him; and that the last renewed bill had been dishonored, and the amount thereof was justly due and owing to the petitioner.

The fiat issued on the 1st May 1839.

The prayer was, that it might be referred to the Commissioner, or the proper officer of the Court, to compute interest on the amount of the bill dated the 15th December, from the time when the same became due; and that the annuity, granted to the bankrupt by the indenture of the 16th of March 1830, might be sold, and the produce applied in payment of what should be found due for principal and interest on the bill; and that the petitioner might have liberty to bid at the sale; and that the residue of his debt, if any, might be admitted as a proof.

Mr. *Bethell*, in support of the petition, said he relied on the cases of *Connop v. Meaks* (a), *Ex parte Knight* (b), and *Berrington v. Collis* (c). In the first of these cases, it was decided that the statute 3 & 4 Will. 4. c. 98. s. 7., which protects bills of exchange payable at three months, or less, from the operation of the usury laws, extends also to warrants of attorney, given to secure payment of such bill. In *Ex parte Knight*, where a creditor had advanced money to a bankrupt, by discounting bills payable within three months from the date, and on the security of the deposit of goods, and took more than 5*l.* per cent. for the discount, it was held that the transac-

(a) 2 Ad. & E. 326.

(b) 1 Dea. 459.

(c) 5 Bing. N. C. 332.

tion was within the provisions of the 3 & 4 Will. 4. c. 98. s. 7. In the last-mentioned case of *Berrington v. Collis*, it was decided, that a loan of money at more than 5l. per cent. upon the security of a deposit of a lease, a warrant of attorney, and a promissory note, was not protected by the statute. But the effect of this last decision is, that if the first contract between the parties in that case had been on a promissory note, and afterwards another security had been given, that would not have affected the original contract, if *bonâ fide* on a bill or note. [Sir John Cross. I observe, that in the last statute, 2 & 3 Vict. c. 37., there is a proviso declaring that nothing therein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein. Now it is material for you to show, that your security is not on lands or tenements.] I rely on the provisions of the former act of 3 & 4 Will. 4. c. 98. s. 7., which was in force at the time of the contract. [Sir John Cross. That statute applies to a note given in the first instance; but not to a note given for a previously existing debt, merely to enable the party to charge more than 5l. per cent. for interest. Sir George Rose. Will the petitioner submit to any order the Court may make, if it should think fit to direct him to deliver up the annuity deed?] The petitioner cannot consent to be so bound.

Mr. Swanston.—As the petitioner will not submit to the jurisdiction of the Court, as to the delivery up of the deed, I object to any further hearing of the petition. The petitioner cannot call on the Court to make an Order in his favour, if he will not submit to an adverse

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Order. If he will not submit to the jurisdiction, his petition ought to be dismissed, with costs.

Sir JOHN CROSS.—I am not prepared to say, at present, that the petitioner is not within the jurisdiction of the Court, in respect of any Order for the delivering up of the deed. He comes to the Court for an Order, as an equitable mortgagee, and acknowledges that he has property of the bankrupt in his possession. But I am not disposed to give a positive opinion on the point of jurisdiction, unless we are judicially called upon to do so. Before I deliver my opinion upon that point, I should like to have these two questions argued,—1st, Whether we have jurisdiction to make such an Order; and 2nd, Whether the petitioner, by the fact of presenting his petition, and the mode of stating his case in such petition, has not consented to the jurisdiction.

Sir G. ROSZ.—The only way, in which the question of jurisdiction can possibly come before us, is, on a counter petition presented by the assignees for the delivering up of the annuity deed. It is impossible for the Court to make an adverse order against a petitioner, on a point which is not brought before us on his petition.

Sir JOHN CROSS.—I admit that we cannot make an order, adversely, on a point which is not brought before us on the petition.

Mr. *Swanston*.—A case occurred in this Court about a year ago, when the late Chief Judge put a petitioner to his election, whether he would submit to the jurisdiction; and the Court refused to hear the petition, on his

refusal to submit. Upon the same principle, in a Court of Equity, on a bill filed for an account, the Court will not entertain the bill, if the plaintiff refuses to abide by the order of the Court, if made against him, on a point where it has not strictly jurisdiction.

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The Court decided against the objection.

Mr. *Swanston* then proceeded to oppose the petition, on the merits. The petitioner applies here for the extraordinary interference of the Court in his favour, when there is no evidence of the bankrupt himself having in any way interfered in the transaction. The petitioner, even in his own affidavit, does not allege, that the bankrupt was in any way a party to the deposit of the deed. The affidavit states, that *Locke*, "acting as the solicitor of the bankrupt," deposited the deed with the petitioner; but there is no allegation that he had authority to do so. And the bankrupt, on his last examination before the Commissioners, expressly stated that *Locke* deposited the deeds with the petitioner without any authority given to him by the bankrupt. It appears, indeed, from the petitioner's own statement, that he never had any communication with the bankrupt.

Mr. *Bethell*, in reply. The Court must take it, that *Locke* had authority from the bankrupt to deposit the deed, from the nature of the transaction, as disclosed in the petition. The petitioner had advanced the bankrupt a large sum of money, and *Locke* had joined him in the bills to secure it. There is no need of proving a special authority from the bankrupt. [Sir *George Rose*. Surely it is for you to prove, that the deeds were deposited with

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the concurrence and approbation of the bankrupt, more especially after the statement of the bankrupt on his last examination. If you can get an affidavit of that fact, the Court may then deal with the petition, but not otherwise.] When it is found, that the attorney went to the bankrupt's creditor to solicit his forbearance, and in order to obtain it, deposited the deed in question, is it not a reasonable inference, that the attorney had authority from the bankrupt to make the deposit?

Sir JOHN CROSS.—There are two objections to the prayer of this petition. 1st. That the debt arises on a bill of exchange, given after the deposit of the deed; and 2dly, that the deed was deposited, without any authority from the bankrupt for that purpose. Now the case of *Barrington v. Collis* (a) decides, that when a party holds a real security for a debt, he has no right to take further security for that debt, by procuring a promissory note from his debtor for the amount of his debt, with interest at 10*l.* per cent. In the present case, it has been put to us in argument, whether the petitioner might not have waived the last bill, and fallen back upon the security of the former bill. But there is no allegation in the petition that he did so, nor in any of the affidavits; and, as to this fact, we are left quite in the dark. The next question is, whether *Locke* had authority from the bankrupt to deposit the deed. It appears that all the transactions passed between the petitioner and *Locke*. The petitioner leaves wholly out of the statement of his case any mention of the terms on which the bill was discounted, or to whom the money was paid.

(a) 5 Bing. N. C. 332.

Then, there is no written memorandum of the deposit of the deed, which a cautious man would have taken, and more especially under such circumstances as gave rise to this deposit. There is also no specific time alleged, *when* the deed was deposited by *Locke*, "acting as the solicitor of the bankrupt." This loose allegation does not show any sufficient authority from the bankrupt to *Locke* to make the deposit. I see nothing in this case to call on us to give time to the petitioner to make an affidavit to amend his case.

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Sir GEORGE ROSE.—There is certainly no allegation in the petition, that makes out the authority of *Locke* to deposit the annuity deed with the petitioner. But, as the Court has looked at the bankrupt's examination on the proceedings, which states that the deposit was made without his authority, I think the petitioner should have time given him to make an affidavit as to that fact, if he is able to do so.

The COURT, on this suggestion of Sir *George Rose*, ordered the petition to stand over to the 27th January; but no affidavit on the subject being then tendered by the petitioner, the Court ordered the

Petition to be dismissed, with costs.





## APPENDIX.

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2 & 3 VICTORIA, Cap. 29.

*An Act for the better Protection of Parties dealing  
with Persons liable to the Bankrupt Laws.*

19th July 1839.

‘ Whereas by an act passed in the sixth year of the reign  
‘ of his late majesty King George IV. intituled “ An Act to  
‘ amend the Laws relating to Bankrupts,” it was among other  
‘ things enacted, that all payments really and bonâ fide made  
‘ by any bankrupt, or by any person on his behalf, before the  
‘ date and issuing of the commission against such bankrupt,  
‘ to any creditor of such bankrupt, (such payment not being  
‘ a fraudulent preference of such creditor,) should be deemed  
‘ valid, notwithstanding any prior act of bankruptcy by such  
‘ bankrupt committed ; and that all payments really and bonâ  
‘ fide made to any bankrupt before the date and issuing of  
‘ the commission against such bankrupt should be deemed  
‘ valid, notwithstanding any prior act of bankruptcy commit-  
‘ ted ; and that such creditor shall not be liable to refund the  
‘ same to the assignees of such bankrupt, provided the per-  
‘ son so dealing with the bankrupt had not, at the time of  
‘ such payment to such bankrupt, notice of any bankruptcy  
‘ committed ; and whereas by an act passed in this present  
‘ session of parliament, intituled, An Act for the better Pro-  
‘ tection of Purchasers against Judgments, Crown Debts, Lis  
‘ pendens, and Fiats in Bankruptcy, it is among other things  
‘ enacted, that all conveyances by any bankrupt bonâ fide  
‘ made, and executed before the date and issuing of the fiat  
‘ against such bankrupt, shall be valid, notwithstanding any  
‘ prior act of bankruptcy by him committed, provided the  
‘ person or persons to whom such bankrupt so conveyed had  
‘ not, at the time of such conveyance, notice of any prior  
‘ act of bankruptcy by him committed ; and whereas it is ex-  
‘ pedient, that further protection should be given to persons  
‘ dealing with bankrupts before the issuing of any fiat against

All contracts, &c. bonâ fide made by and with any bankrupt previous to the date and issuing of any fiat to be valid, &c. if no notice had of prior bankruptcy.

' them : ' Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, That all contracts, dealings, and transactions by and with any bankrupt, really and bonâ fide made, and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed ; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed ; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney, or cognovit given by any bankrupt by way of such fraudulent preference.

Act may be repealed, &c.

II. And be it further enacted, that this act may be repealed or altered by any other act in this present session of parliament.

Ex parte WILLIAM GEORGE PRESCOTT, GEORGE GROTE,  
and others.—In the matter of WILLIAM PHILLIPS.

1839.

*Westminster,  
November 11th.*

**THIS** was a petition to prove a debt of 1162*l.*, for the purpose of voting in the choice of assignees, and of assenting to or dissenting from the certificate.

The fiat was dated the 31st July 1839. The bankrupt was a member of the Central Bank of Liverpool, which was established under the 7 *Geo.* 4. c. 46., and his name was entered as one of such members in an account or return delivered at the Stamp Office on the 2d November 1838, in pursuance of the fourth section of the above act. The petitioners, in February 1839, in the way of their business, as bankers, discounted for the Liverpool Bank five several bills of exchange for various sums, amounting in the whole to 1162*l.* 1*s.*, all of which were indorsed by the Liverpool Bank, and were dishonoured when they became due; and notice of dishonour was duly given to the bank. On the 24th August last, (being the first meeting under the fiat,) the petitioners applied to prove the amount of these bills for the purpose of voting in the choice of assignees; when they produced a copy of the return filed at the Stamp Office, and certified under the hand of one of the Commissioners of Stamps, in support of such proof. The proof was objected to, on the ground that the bankrupt, on the 9th November 1838 sold his shares in the bank to one *Edgar Boyer*, and that he thereupon gave notice of such sale to the bank, and directed them to transfer his shares to *Bowyer*. The transfer, however, was not

The bankrupt having taken some shares in a joint banking company, a return was filed at the Stamp Office on the 2d November 1838, pursuant to the directions of the 7 *Geo.* 4. c. 46., in which his name was entered as one of the members of the company. On the 9th November, the bankrupt agreed to sell his shares to B., but the deed of transfer of the shares was not executed till the 9th March 1839, nor was any fresh return sent into the Stamp Office, notifying the change of ownership, until the 25th March 1839; but notice of the sale of the shares to B. was given to the bank on the 13th November 1838; and in December 1838 he was appointed one of the directors of the company, as the owner of such shares. On the 19th February 1839, the banking company

indorsed bills to the petitioners. *Held*, that the bankrupt was to be considered as a partner in the banking company at the time of the indorsement on the bills, and that the petitioners might therefore prove against his estate, for the purpose of voting in the choice of assignees, and assenting to or dissenting from his certificate.

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actually signed and completed until the 9th March 1839, which was after the bills had been indorsed by the Liverpool Bank to the petitioners; and no return was delivered by the bank at the Stamp Office, subsequent to the return of the 2d November 1838, until the 25th March 1839; when a return was made, in which the bankrupt's name was omitted, and the name of *Bowyer* inserted instead, as a member or partner of the banking company. The purchase-money for the shares, however, was fully paid in January 1839; and *Bowyer* was, previously to that period, not only recognized by the banking company as a shareholder in respect of the shares, but was in December 1838 actually appointed one of the directors. Upon this objection the Commissioners rejected the proof, thinking that the bankrupt, after the sale of his shares on the 9th November, had ceased to have any interest in the bank, and that, consequently, he could not be held liable as a member or partner, in respect of any subsequent engagements of the bank; for that, notwithstanding the transfer of the shares had not been actually made until the 9th March, yet the bankrupt had notified the sale to the bank, whose duty it was to prepare the transfer, and *Bowyer* had also been recognized and treated by the bank as the proprietor of the shares.

It was submitted, on behalf of the petitioners, that the liability of the members of the banking company, whose names appeared as such on the return filed at the Stamp Office, continued, although they had actually sold their shares, until, by some subsequent return omitting their names, it should appear that they had ceased to be such members or partners, or notice thereof should have been otherwise given to the parties dealing with the bank; and that, notwithstanding such alleged sale, yet

in point of law, and for the purposes of the act of parliament, the bankrupt continued until the 25th March 1839 to be a member of the banking company, and responsible for its engagements up to that period.

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Mr. *Russell*, and Mr. *Anderdon*, in support of the petition. It is not questioned that the bankrupt, in the beginning of November 1838, was a partner in this bank; but it is said, that by an agreement, entered into between him and *Bowyer* on the 9th November 1838, for the sale of his shares, the bankrupt's liability ceased altogether. The agreement, however, was subject to the approval of the banking company; and, in point of fact, no complete transfer of the shares was made till the 9th March 1839. In the meantime, the bills were indorsed to the petitioners. Now we contend, that *Bowyer*, at most, had only an equitable title to the shares; the legal title to them remained in the bankrupt, and he continued liable, as between him and the world, to all the transactions of the bank, till, by a complete transfer, the legal title was divested. It may be objected, perhaps, that because the petitioners have proved the amount of the bills against the estate of *Boyer*, who has also become a bankrupt, they have waived their right of proof against *Phillips*. But *Bowyer* is also a separate indorser of the bills in question; and it is in that character only that we prove against his estate, and not as recognizing the transfer of the shares to him to have been complete before the bills were indorsed to the petitioners. The first section of the Joint Stock Banking Act, 7 Geo. 4. c. 46., provides, "that every member of any such corporation or copartnership, shall be liable to, and responsible for, the due payment of all bills and notes which shall be issued, and

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for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such a person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, *or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes* by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership." Now we say, that *Phillips* was a member of the Liverpool Bank at the time of the bank borrowing this money of the petitioners upon the bills in question. The fourth section of the act provides, that a return of the names of the members of every banking company shall be filed at the Stamp Office. And the sixth section declares, "that a copy of any such account or return so filed or kept, and registered at the Stamp Office, as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the Commissioners of Stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a Commissioner or Commissioners, shall, in all proceedings civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, *and also of the fact that all persons named therein, as members of such corporation or copartnership, were members thereof at the date of such account or return.*" We contend, therefore, that when the petitioners

produced a certified copy of the return filed at the Stamp Office, on their application to prove their debt against the estate of *Phillips*, the Commissioners were bound to receive it as proof of the fact that *Phillips* was a member of the banking company at the date of such return. Then the eighth section of the act declares, "that the secretary or other officer of every such corporation or copartnership shall, and he is hereby required, from time to time, as often as occasion shall render it necessary, make out, upon oath, in manner hereinbefore directed, and cause to be delivered to the Commissioners of Stamps as aforesaid, a further account or return, according to the form contained in the schedule marked (B) to this act annexed, of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, *and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to, or in the place or stead of, any former member or members thereof.* And such further accounts or returns shall from time to time be filed and kept and entered and registered at the Stamp Office in London, in like manner as is hereinbefore required with respect to the original or annual account or return hereinbefore directed to be made." As long, therefore, as the name of *Phillips* appeared on the last return delivered into the Stamp Office, as one of the members of this banking company, so long does he remain a partner, to all intents and purposes, as between him and the rest of the world, and in

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no way could he have discharged himself from his liability, but by procuring a further return to be filed, according to the directions of the act. The bankrupt never determined his character of partner, within the intent and meaning of the act of parliament, until long after the bills in question came to the hands of the petitioners. He remained the legal owner of the shares, and as such the Court must deal with him, without being influenced by any equitable considerations arising out of the contract for the sale of the shares.

Mr. *Swanston*, and Mr. *Dixon*, *contra*. The return filed at the Stamp Office is no evidence that the bankrupt was a partner, except at the date of the return. From the 9th November 1838, when the agreement between *Bowyer* and the bankrupt was entered into for the sale of the shares, the bankrupt ceased to have any equitable interest in them, and could only be considered a bare trustee for the purchaser. On the 13th November, notice was given to the bank of the sale of the shares; and they so far approved of it, that in the following month they chose Mr. *Bowyer* a director of the company, without any other qualification than his contract for the purchase of the bankrupt's shares. In equity therefore, most assuredly, if not at law, the bankrupt at that time, if not sooner, ceased to have any interest whatever, direct or indirect, as a member of the banking company, and was therefore exempt from all liability as a partner. The equitable title was certainly in *Bowyer* from the date of the agreement for the sale of the shares; and when the transfer to him was finally executed, the legal title related back to the same period.



Mr. *Russell*, in reply, was stopped by the Court.

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Sir JOHN CROSS.—We have no evidence of the actual date of the indorsement of these bills to the petitioners. From the return filed at the Stamp Office, and from the admission of the respondents themselves, it appears that *Phillips* was a partner in this bank, at all events on the 13th November; for it was not before that day, that notice was given to the bank of the sale of the shares. They, who say that he subsequently ceased to be a partner, have the *onus probandi* cast upon them; and if they fail in proving the cessation of the partnership, we must take it as existing until the actual execution of the deed of transfer of the shares. Now, in my opinion, it has not been proved satisfactorily, that the bankrupt ceased to be a partner prior to the execution of the deed of transfer. If the assignees, however, think it material, they may take an inquiry when the bills were indorsed to the petitioners; and if that be proved to be subsequent to the transfer, then of course the petitioners will have no right of proof.

Sir GEORGE ROSE.—The question is, whether the bankrupt did not continue a partner, until divested of the legal estate in the shares in question—not as between him and his copartners, but as between him and the rest of the world,—and liable consequently for all the partnership transactions, until his legal title was extinguished. If this were even the case of an ordinary partnership, all that the petitioners need do would be to show, that the bankrupt appeared to the world as a partner at the time when the bills were indorsed; and then the question would be, how the petitioners would be affected by a

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contract of one of the partners for the sale of his share to a third party. There is a great difference between partners as to the world, and partners *inter se*. If we were now trying an action, the proof before us would be conclusive. The whole question is, whether there is evidence to satisfy us, that, at the time when the petitioners took the bills, the bankrupt appeared to the world as a partner in the bank. The formality of a deed of transfer might not, perhaps, be necessary to divest the bankrupt of his liability as a partner. But as it is provided by the sixth section of the act of parliament, that the return filed at the Stamp Office shall be evidence that the parties named therein are partners, a subsequent return ought to have been made under the eighth section, in order to notify to the world any change in the members of the partnership; or, at all events, there should have been proof of some notorious act, to show that *Phillips* had ceased to be a member of the partnership. Now, here, there is no evidence to the world of the cessation of *Phillips's* liability as a partner in the bank, until the execution of the deed of transfer. The evidence furnished by the assignees themselves appears to me conclusive, that the agreement for sale of the shares to *Bowyer* was executory only until the execution of the deed of transfer; else, why was it not sooner executed? There must, however, be an inquiry as to the time when these bills were indorsed to the petitioners, of which we have no evidence. If, indeed, this were a question between the petitioners and the assignees, any inquiry would then be superfluous; as the proof is not sought for with a view to any dividend, but merely as a check upon the certificate. The bankrupt, however, being

naturally interested in that result, an inquiry becomes indispensable.

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The ORDER was, that it should be referred to the deputy registrar, to ascertain when and how the bankrupt ceased to be a partner in the bank, and when the bills in question were indorsed to, or came to the hands of, the petitioners; the petition, in the mean time, to stand over.

*Note.*—The report of the deputy registrar found, that the bills were indorsed on the 19th February, and that the deed of transfer was not executed until the 9th March; whereupon the proof was ordered to be admitted (a).

(a) See *Harvey v. Kay*, 9 B. & C. 356.

Ex parte DALBY.—In the matter of DALBY.

Westminster,  
November 25th.

THIS was the petition of the bankrupt to annul the fiat, for want of a good petitioning creditor's debt. It appeared, that a portion of the debt had been contracted since the bankrupt left off trading, and that the remainder, which was contracted whilst he continued to carry on his trade, did not amount to 100*l*.

Where part of the petitioning creditor's debt is contracted after the bankrupt ceased to trade, and the remainder does not amount to 100*l*., it is not sufficient to support the fiat.

Mr. *Anderdon* was in support of the petition.

Mr. *Ellison* for the petitioning creditor.

The COURT said, that this fiat could not stand; that there was a wide distinction between a case of this kind,

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and one where part of the debt had been contracted *before* the trading, and the remainder during the trading; in which case the whole debt existed during the continuance of the trading.

ORDER to annul.

Ex parte WILLIAM MONK and others.—In the matter  
of WILLIAM MONK.

Westminster,  
November 25th.

Where the bankrupt applies to supersede an old commission, on compounding with his creditors for the residue of their debts, and the assignees are dead, there must be a new choice of assignees, and the bankrupt must proceed under the composition contract clauses of 6 Geo. 4. c. 16. s. 133. 134.

THIS was the petition of the bankrupt and his two sons to supersede a commission, which issued against him so far back as the year 1804. It appeared, that the bankrupt had duly surrendered to the commission, and had passed his last examination; and that the debts proved amounted to 684*l.* 14*s.* 4*d.*, upon which a dividend of 8*s.* 6*d.* in the pound had been paid to the several creditors. The assignees were both dead, and the proceedings were lost; but all the creditors and their representatives, who could be discovered, had agreed to supersede the commission, upon being paid a composition by the bankrupt's sons for the residue of their debts. There were other creditors, however, who could not be discovered; but their debts amounted only to 33*l.* 8*s.* 2*d.*; and it was now proposed to pay this sum into Court.

Mr. *Anderdon*, in support of the petition, said, that the only case which bore upon the present was *Ex parte Wallis (a)*, where the son of a deceased creditor was permitted to sign a consent to the supersedeas. In the

(a) 2 G. & J. 25.

present case, no possible detriment could arise to the creditors who had not signed their consent to the supersedeas; as the whole amount of their debts would be secured to them, or their representatives, by the payment into Court.

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The Court said, that the only mode of effecting the object of the petitioner, was by calling a meeting for a new choice of assignees, and then proceeding under the composition contract clauses in the 6 Geo. 4. c. 16. s. 133. 134; for that otherwise the creditors would not be bound. It must be referred to the Commissioner, to whom the commission has been transferred, to inquire whether any sales have taken place under the commission, and if any detriment will arise to any person in superseding it; the petitioner undertaking to confirm all sales, in the event of the commission being ultimately superseded. If the proceedings are lost, the Commissioner may act on the list of debts set out in the petition, provided he is satisfied of its correctness.

Ordered accordingly.

Ex parte WHIBLEY.—In the matter of ATKINSON.

ON the opening of this fiat, it appeared that the Commissioners had, through inadvertence, admitted the proof of the petitioning creditor's debt on the mere production of his affidavit, without an order of Court having been previously obtained for that purpose.

Westminster,  
November 25th.

An Order was made, *nunc pro tunc*, for dispensing with the petitioner's attendance at the opening of the fiat.

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Mr. *Bichnan* now applied for an order *nunc pro tunc*, that the petitioning creditor's attendance at the opening of the fiat might be dispensed with.

The COURT made the Order as prayed.

Ex parte ANDREW CALDECOTT and others.—In the matter of JOHN HEATH and EDWIN HEATH.

Westminster,  
November 6th.

Although it is no objection now to a fiat, that it is merely concerted with the petitioning creditor, yet if it is fraudulently concerted, and the object is to serve the bankrupt's own purposes, and not to benefit his creditors,—as where there are no assets to divide,—it will be annulled.

Where a petitioning creditor's debt was made up of a sum paid by him in part discharge only of a bill of exchange, which he had accepted as surety for the bankrupt, and the bill itself continued in the hands of an adverse holder,—held bad.

The assignee under a fiat, which is annulled for fraud,

cannot have his costs against the petitioning creditor.

THIS was the petition of the general body of the creditors of the bankrupts to annul the fiat, on the ground of concert and fraud.

The bankrupts were drapers at Totness in Devonshire; and on the 29th October 1838, their father, one *Samuel Heath*, a blacksmith, issued the fiat against them, as petitioning creditor, for an alleged debt of 510*l.* The debts due at the time of the bankruptcy amounted to 2329*l.* 8*s.*, including the debt of 510*l.* alleged to be due by them to their father; the debts due to the petitioners and other London creditors making up the residue. The assets amounted to 180*l.*, only 80*l.* of which were considered as bad and doubtful; but there was no stock in trade, or other effects. On the 22d August, 1838, two of the petitioners received a letter from the solicitor for the bankrupts, stating they had laid their affairs before their country creditors, and offering a composition of 6*s.* in the pound to their London creditors. In consequence of this intimation, the London creditors held a meeting, and sent an agent down to examine into the bankrupts' affairs, and report thereon.

On the 3d of September 1838, the bankrupt, *John Heath*, convened a meeting in London of the London creditors, and again offered the composition of 6s. in the pound, stating, that there was at that time an execution on the premises for 450*l.*, but that if the composition were accepted, the execution creditor would withdraw. From the unfavourable report of their agent, the creditors at that meeting refused to accept this offer, and pressed that the bankrupts should assign all their estate and effects in trust for their creditors. In answer to this proposal, *John Heath* said he would consult a friend; for which purpose he left the room, but never returned, quitting London the same night, without giving any reply. The execution referred to was levied at the suit of *James Pullin*, the brother-in-law of the bankrupts, and *Richard Heath*, their brother, as trustees under the marriage settlement of *John Heath* with *James Pullin's* sister, for the alleged debt of 400*l.* on *John* and *Edwin Heath's* joint bond; the action on which it was founded being by writ of summons served on the bankrupts in July 1838; and, by their suffering judgment to go by default, the execution was levied on the 13th of August, 1838. The bankrupts paid 200*l.* on account of the execution, which remained on the premises for two months; during which time the bankrupts carried on their business as usual, receiving money on sales, and retaining part for their own use, and to pay another execution issued subsequently. *Prestwell* was attorney for this latter execution creditor, as also for *Samuel Heath*, the bankrupt's father, and for the bankrupts. About the end of August, an execution was levied on the bankrupt's premises, at the suit of their father, for about the sum of 337*l.* 5s.; but it appeared that they were only then indebted to him in 80*l.*, which

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had been advanced by him to the bankrupts, to enable them to take up in part a bill for 100*l*. He was then, however, under certain liabilities for the bankrupts, in respect of other bills of exchange and notes accepted for their accommodation ; and on the 23d October he paid a sum of 20*l*., in part discharge of another bill, which he had accepted for the bankrupts ; thereby making up the sum of 100*l*. due to him from the bankrupts. The petitioners alleged, that this was done in collusion with the bankrupts, to enable him to substantiate a good petitioning creditor's debt. On the 5th and 6th October 1838, some of the petitioners took proceedings against the bankrupts, under the 8th section of the recent Act for the Abolition of Arrest (*a*) ; and the bankrupts, not having complied with the requisitions of that statute, thereby committed an act of bankruptcy. The twenty-one days, from the service of the affidavits and notices requiring payment of the debts, expired on the 26th and 27th October ; and it was on the 23d of that month that the father paid the 20*l*., in part discharge of the bill already mentioned. On the same day, he swore his affidavit of debt for 100*l*. as petitioning creditor, to ground the fiat. On the 24th, the docket was struck. On the 25th, the bankrupts committed a voluntary act of bankruptcy, by denial to a creditor, and keeping house ; and on the 29th the fiat was issued. In the affidavit of debt, *Samuel Heath*, the father, swore to a debt of "100*l*. and upwards," and stated that his only security was a bill of exchange, dated 23d March 1838, for 100*l*. (to take up which bill in part the 80*l*. had been advanced), and also a receipt for 20*l*., dated 23d October 1838, signed by the holder of the bill, upon which the 20*l*. had been paid.

(*a*) 1 & 2 Vict. c. 110.



The father did not prove this debt, or any other debt, at any subsequent meeting. The petitioners charged, that the father had no legal right of action against the bankrupts to the amount of 100*l.*, at the date of the fiat, and that he was not a *bonâ fide* creditor at that time; that at the time the first execution issued against the bankrupts' effects, their stock and assets amounted to 1100*l.*, which was reduced, at the period of a subsequent sale under another execution, to the value of 346*l.*, the bankrupts having been allowed to deal with it as they pleased in the meanwhile; that the petitioners proved their several debts under the fiat, in ignorance of the true state of the bankrupts' affairs; that no assets had been realized under the fiat, and that such as might be realized would not pay the expenses even of working the fiat; that the fiat was sued out by the father, in collusion with the bankrupts, and for their benefit, and not for the purpose of making the same available for the satisfaction of their *bonâ fide* creditors.

Mr. *Anderdon*, in support of the petition. The object of the petitioning creditor was to screen the bankrupts from the payment of their just debts. He well knew, when he issued the fiat, that there were no assets to divide amongst the creditors, and that no good could possibly arise to them from working the fiat. The docket was struck by him before the commission of any act of bankruptcy; and as to the voluntary act of bankruptcy committed by the bankrupts on the 25th October, there can be no doubt that that was concerted between them and the petitioning creditor. The present petitioners proved their debts, in perfect ignorance of the facts under which the fiat was issued. [Sir *George Rose*. The first difficulty is the length of time that has elapsed

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since the fiat issued. If you have any affidavit, so as to get over that, the course is very plain.] The affidavits account very satisfactorily for the time that has elapsed; we dispute the validity of the petitioning creditor's debt, as well as that of the act of bankruptcy. For the debt was made up of the 20*l.*, which he had paid only in part of a bill for 100*l.* accepted by him as surety for the bankrupt, and not in discharge of the whole bill. But even if all the requisites had been sufficient to support the fiat, yet if it was taken out for an improper purpose, this Court will order it to be annulled, as in *Ex parte Gaitskill (a)*. And although the 1 & 2 Will. 4. c. 56. s. 42. declares, that no fiat shall be annulled by reason only that it has been concerted between the petitioning creditor and the bankrupt,—yet that act was never intended to sanction a fraudulent fiat, such as that now before the Court, where the motive is to screen the bankrupt from the payment of his debts, and there are no assets to divide amongst his creditors. Before the statute alluded to, a commission, which was issued at the mere request of the bankrupts, was held to be supersedable; *Ex parte Gane (b)*; and the statute only declares, in effect, that such a commission shall not be now supersedable, where there is no *fraudulent* connivance between the petitioning creditor and the bankrupt. But, where the object in issuing the fiat is plainly fraudulent, the Court will not be restrained from superseding it by any scruples as to the mere lapse of time. Thus, in *Ex parte Poole (c)*, where the petition was presented years after the commission had issued, and six

(a) 1 Mont. & C. 160; 3 Deac. 635.

(b) Mont. & M'A. 399.

(c) 2 Cox, 227; Mont. & M. 400, note.

months even after the allowance of the bankrupts' certificate, the Lord Chancellor said, that where the whole transaction appeared to be such a mere trick and contrivance, as it evidently was in that case, it was impossible for the Court to let such a commission stand; and that it never would permit its process to be turned into an engine of fraud. This is one of the strongest cases that can be cited in support of the present petition.

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Mr. *E. Chitty*, on behalf of the assignee, consented to the annulling of the fiat.

Mr. *Bethell*, for the petitioning creditor. The whole prayer of the petition is confined to annulling the fiat, on the ground of the fiat being concerted, as well as the act of bankruptcy. The petitioners admit a case of insolvency, but do not express any intention to issue another fiat against the bankrupt, if this should be annulled. There is no charge against the Commissioners, or the assignees; and the allegations in the petition only amount to general statements of suspicion, as to the concert and confederacy of the bankrupts with their father, in the issuing of the fiat. It has often been said, that a creditor cannot petition to annul, without offering to issue another fiat. [Sir *John Cross*. Not if there are no effects to be administered, as in the present case; for that proceeding would then be useless.] [Sir *George Rose*. How can you get over the petitioning creditor's debt,—20*l.* of which was paid by him in part discharge, only, of a bill accepted by him as surety for the bankrupt?] I was not aware before, that the petitioning creditor was the acceptor of the accommodation bill. I feel it impossible to contend against this.

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Sir JOHN CROSS.—There can be no doubt, in looking at all the facts of this case, that the fiat was not sued out by the father of the bankrupts for the benefit of the creditors—for there was nothing to divide amongst them—but that it was sued out in collusion with the bankrupts, and for the mere purpose of whitewashing them from their just liabilities. In the first place, it is not disputed that there was not a good petitioning creditor's debt. It is singular, that *Presswell*, the attorney, says, that he was instructed by the father of the bankrupts to issue an execution against them in August 1838 for 337*l.*; although it was necessary for the father, acting by his advice, to advance the sum of 20*l.*, in order to make out a good petitioning creditor's debt of 100*l.* Nothing was said afterwards about this pretended debt of 337*l.* The payment of the 20*l.* could not have been for any other purpose than that of making up an amount sufficient to constitute a petitioning creditor's debt; for there does not appear to have been the least pressure on the part of the holder of the bill for 100*l.* On the next day, and before the commission of any act of bankruptcy, the solicitor advises the father to strike the docket; but the fiat is not taken out till the 29th, in order that the bankruptcy might not interfere with the prior dealings of the family of the bankrupts with their effects. No one can doubt but that this is a fraudulent fiat, and is not such an one as was intended to be protected by the statute.

Sir GEORGE ROSE.—The petitioning creditor had only a debt of 80*l.* due to him, even assuming that to be *bonâ fide*. The 20*l.* was paid in part discharge only of a bill for a larger amount; it was not paid in discharge of the whole, nor was the bill consequently delivered up

to him. As to that sum, therefore, the petitioning creditor stood as a mere surety for the bankrupts paying a part only, and not the whole, of the debt. He could not prove the 20*l.* as a debt; for the 6 *Geo.* 4. c. 15. gives him no power to do so. If he could not carry it on to proof, therefore, it cannot stand as a good petitioning creditor's debt. But, on the grounds stated by my learned colleague, I agree that this fiat must be annulled at the costs of the petitioning creditor.

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and others.

Mr. *E. Chitty* then applied for the assignee's costs as against the petitioning creditor. It was necessary for the assignee to appear, after being served with the petition, and there is no fund out of which he could have his costs, except from the petitioning creditor; who, as a party to the fraud, ought to bear the full burthen of the consequence of his conduct. The assignee had been chosen by the *bonâ fide* creditors, for the purpose of rescuing the fiat from the entire control of the bankrupts and their family; and he would not have accepted the trust, if he had not been pressed by those creditors to take upon himself the office.

The COURT said, that they could not give the assignee his costs against the petitioning creditor, but that the creditors who brought him forward ought to indemnify him from his acceptance of the trust.

The ORDER was, that the fiat should be annulled, with costs; with liberty to the petitioners to take out a new fiat, if they thought fit, to be directed to a London Commissioner, and the proceedings to be transferred accordingly.

1840.

*Westminster.  
Jan. 16th,  
coram Lord  
Chancellor.*

*Order made for  
change of venue,  
under special  
circumstances.*

Ex parte WILLIAM LYCETT.—In the matter of THOMAS WILD.

THIS was an application by the petitioning creditor, on an original petition to the Lord Chancellor, praying that a fiat might be directed to London, instead of Cheltenham, where the bankrupt resided. The affidavit in support of the petition stated, that the petitioner was informed and believed that the debts of the bankrupt, who was a draper at Cheltenham, amounted to 6930*l.*, and that only two creditors to the amount of 1060*l.* resided at or near Cheltenham; that twenty-two creditors, whose debts amounted to 2700*l.*, resided in London; that one creditor to the amount of 2628*l.* resided at Bedford; and that the other creditors, thirteen in number, and whose debts amounted to about 700*l.*, resided principally in the counties of Nottingham, Warwick, Stafford, and Lancaster; and that all the witnesses to support the fiat resided in London.

Mr. *Randall*, in support of the petition, stated that a previous application had been made to the Court of Review, which had been refused.

The LORD CHANCELLOR made the Order as prayed.



1840.

**Ex parte ROBERT CASTLE and others.**—In the matter  
of **RICHARD JONES TODD.**

*Westminster,  
Jan. 22d.*

**THIS** was a petition of the petitioning creditor and other creditors to amend the fiat, by directing it to another list of Commissioners, and for one month's further time to open it. It appeared, that the fiat issued on the 3d January 1840 directed to Commissioners at Cardiff, one of whom was a creditor of the bankrupt, and that three of the other Commissioners declined acting. Most of the creditors resided at Bristol. Since the issuing of the fiat, negotiations had been pending for a compromise between the bankrupt and his creditors. The object of the petition was to transfer the fiat to a list of Commissioners at Bristol, as well as to be allowed more time for opening it.

Where the Commissioners in a country fiat decline to act, the Court will either order a new fiat to issue to another list, or the present fiat to be amended by inserting the names of other Commissioners, at the option of the petitioning creditor.

The Court will not extend the time for opening a fiat, by reason of negotiations pending for a compromise between the bankrupt and his creditors.

**Mr. Wordsworth** appeared in support of the petition.

**Sir JOHN CROSS.**—The fiat was issued on the 3d January, and all this time a treaty for a composition has been going on between the bankrupt and his creditors. It is doubtful, whether we ought, under these circumstances, to extend the time for opening the fiat. But there are peculiar circumstances in this case. One of the Commissioners is a creditor and cannot act, and the others shrink from the discharge of their duty. It is strange that Commissioners should decline acting, without stating any reason for their refusal. The only point is, whether there should be a new fiat, or whether the present one can be amended, by adding the names of the

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Ex parte
CASTLE
and others.

fresh list of Commissioners and directing it to a new place.

Sir GEORGE ROSE.—The pendency of negotiations for a compromise has always been declared by the Court to be a reason against an application for extending the time for opening the fiat. For it would be an abuse of the process of the Court, and would be the means of harassing the bankrupt, if a fiat was to be suspended *in terrorem* over his head, for the purpose of driving him and his friends into an unfair composition. If this application therefore had stood merely on the ground, that negotiations for a compromise had been going on between the bankrupt and his creditors, it must have been refused. But as the Commissioners have declined to act, the petitioners may either take a new fiat, which will give them all the time they require,—or they may amend this fiat by inserting the names of other Commissioners. If the latter course be adopted, we cannot extend the time,—and if the former, all the consequences in point of expense must ensue.

ORDERED, that the petitioners might either issue out a new fiat, or amend the present one, by inserting a fresh list of Commissioners.



1840.

Ex parte GEORGE POLLARD.—In the matter of THOMAS COURTNEY and GEORGE COURTNEY.

*Westminster,
May 2d.*

THIS was a petition, praying that the assignees might be ordered to pay over the proceeds of the sale of certain premises, of which the petitioner had been declared to be equitable mortgagee by an Order of the Lord Chancellor, overruling a decision of this Court. For the facts of the case, see 2 Deac. 367, and 4 Deac. 27.

Where, after the judgment of this Court had been reversed on a special case by the Lord Chancellor, and the matter referred back for consequential directions, one of the parties had obtained leave from the Lord Chancellor to appeal to the House of Lords, unaccompanied by any Order as to stay of proceedings: *Held*, that this had not the effect of staying the proceedings, although it was a circumstance to guide this Court, in the exercise of its discretion, whether it would make any consequential Order, till the appeal was determined.

The terms of the Lord Chancellor's Order, which was dated 20th January 1840, were as follows: "Declare that the petitioner is entitled to stand as equitable mortgagee on the premises in the special case (a) mentioned, and to have a preferable claim for such debt, as the Court of Review may, upon investigation, find to be due to him upon the securities in the said special case mentioned. And I do refer the case back to the said Court of Review." It was arranged between the parties, subsequently to the presentation of the petition of appeal to the Lord Chancellor, that the property should be sold, and the proceeds invested, to abide the result of the appeal, without prejudice to either party. In pursuance of this arrangement the property was sold, and the assignees deposited the proceeds in the bank of the British Linen Company in Scotland. The petitioner stated, that he had often applied to the assignees for an account of the proceeds, but had never obtained such account.

On the 14th February 1840, the assignees made an application to the Lord Chancellor for leave to appeal (b) from his decision to the House of Lords, whereupon the Lord Chancellor granted such permission;

(a) See *ante*, 27.

(b) See *ante*, 43.

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and directed the whole facts, whereon the question arose, to be stated in the form of the petition of appeal to the House of Lords. It appeared, that the Lord Chancellor's Order of the 20th January was not delivered out until the 15th February, which was the day after leave was obtained to appeal to the House of Lords. Since the leave to appeal was thus obtained, some correspondence took place between the solicitor for the petitioner, and the solicitor for the assignees; in which the latter assured the petitioner's solicitor, that "if he should think the assignees not justified in appealing, he would advise them to arrange the matter at once; but that, until the assignees had made up their minds whether they would appeal or not, he did not think himself justified in formally giving answers to all the questions proposed to him."

It did not appear, that any steps had been taken in the way of an appeal, or that any meeting of creditors had been convened to determine whether the appeal should be proceeded with. But it was stated on the part of the assignees, that they were waiting, before they made up their minds, until they had obtained the opinions of Scotch lawyers, and the assent of certain creditors. No application, however, had been made to stay further proceedings during the pendency of the appeal.

The petitioner prayed, that the proceeds of the property in question might be paid over to him, and that he might be declared entitled to the intermediate rents and profits; the petitioner submitting to have a proof he had made expunged, and to refund the dividends he had received.

The question was, whether the leave given by the

Lord Chancellor to the assignees to appeal to the House of Lords was to operate as a stay of proceedings.

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Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. When the Lord Chancellor gave the assignees leave to appeal (a) to the House of Lords, he did not mean to disturb the former Order made by him on the 20th January. Every one knows, that the mere liberty to appeal, without more, does not stay an Order. When the assignees obtained leave to appeal, what they ought to have done was, to have applied for an Order to stay in the meantime all further proceedings. This, however, formed no part of their application ; for they well knew that the opinion of the Lord Chancellor was so strong in favour of the petitioner, that he would have refused such an application. It was not until after leave was given to appeal, that the Order of the Lord Chancellor directing this Court to proceed in the matter was delivered out by his officer ; this is a strong circumstance to show that it was not his Lordship's intention that the proceedings on the Order should be stayed. And when the application was made for leave to appeal, the Lord Chancellor expressly said, that he granted the application, not because he doubted his own judgment, but because he considered it an invidious office for a judge to refuse leave to appeal from his own judgment. If the assignees had even appealed immediately, which they might have done, and shown diligence, yet this would not have had the effect of staying the proceedings on the Order ; *à fortiori*, therefore, where there is no pro-

(a) By the 46th Order of the House of Lords for the regulation of matters of appeal, the application for leave to appeal is to be made to the Court by which the decree is pronounced. And see 1 & 2 Will. 4. c. 56. s. 37.

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spect of a speedy hearing, the Court will not refuse to give the petitioner the full benefit of the Order of the 20th January. That Order has declared the petitioner to be equitable mortgagee of the property; and as it has been sold by the assignees, they are bound to pay over the proceeds to the petitioner. There may be a question raised perhaps on the other side, as to the effect of the proof by the petitioner for the amount of his debt against the joint estate, and his subsequent receipt of dividends upon the proof so made. But proof made against the joint estate is no waiver of a separate security. Besides, the proof was made by the petitioner under a misapprehension of his rights; and the Court is in the habit of rectifying any mistake that may have been inadvertently made in the proof.

Mr. *J. Russell*, for the assignees. There were two objections to the claim set up by this petitioner:—1st, that the law of Scotland does not allow of the conveyance of freehold property, by way of equitable mortgage; and 2ndly, that the petitioner was estopped by his proof, which had been upon the proceedings and acted upon for several years.—As to the allegation that an appeal is no stay of proceedings, we admit, that the pendency of an appeal from a decree of a Court of Equity does not, *per se*, stay the proceedings; but it has that effect upon a judgment at law, or a judgment of the Court of Session in Scotland. [Sir *J. Cross*. So a writ of error stays the proceedings on a judgment of a Court of Law.] We do not wish to stay the execution of an existing order, but to let the proceedings remain as they are, and prevent any fresh Order being made before the appeal is determined. For if this Court should make the Order

now applied for, and the House of Lords should decide the appeal in favour of the assignees, the consequence would be very prejudicial to the estate, in having taken from it funds to which it was ultimately found to be entitled. It is entirely in the discretion of this Court to make any further Order; and if the Court decline to make any Order on this petition, the matter will then rest till the judgment of the House of Lords is given. No prejudice will in that case happen to the petitioner, except from delay; which can easily be compensated by the investment of the property in the mean time. It would not have been proper for us to have applied to the Lord Chancellor to stay proceedings; for if we had, we should only have been told that he had no jurisdiction. All the Lord Chancellor could do, was to refer the original petition back to this Court, to make directions consequential upon his giving judgment in favour of the petitioner; his giving leave to appeal would be no ground for interfering with such directions. With respect to the delay that is charged against us in prosecuting the appeal, that is accounted for in two ways; 1st, the assignees have been waiting for the consent of all the creditors to prosecute the appeal; 2ndly, the present is the first instance, since this Court was established, of prosecuting an appeal in Bankruptcy to the House of Lords; and there are great difficulties as to the mode of proceeding, arising from the Standing Orders of the House of Lords not having provided for an appeal from the Lord Chancellor sitting in bankruptcy. By the 46th Order of the House of Lords, it is directed, that all persons desirous to exhibit any petition of appeal from any Court of Equity do present their petitions within fourteen days after the beginning of the session of parlia-

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ment, or within fourteen days after the making of the decree of any Court of Equity. Now, the Order of the Lord Chancellor made in this matter was not a decree of a Court of Equity, and does not seem to come within the above provision. It may be necessary, therefore, to present some special petition to the House of Lords, before presenting the petition of appeal. We are, moreover, waiting to obtain the opinion of eminent Scotch lawyers, as to the main question. But it is the intention of the assignees to prosecute the appeal as soon as possible; and the Court will therefore not allow this money to go away from the estate of the bankrupt.

Mr. *Swanston*, in reply. All the difficulties that have been dwelt upon, of prosecuting the appeal, afford a still stronger reason for the petitioner pressing for the judgment of this Court. The Order of the Lord Chancellor, instead of operating as a stay of proceedings, is mandatory upon this Court to administer justice to the petitioner. That Order declares, that the petitioner is entitled to stand as equitable mortgagee on the premises mentioned in the special case, and to have a preferable claim, for such debt as the Court of Review may find to be due to him. There being no Order therefore to stay proceedings, this Court is bound to proceed in giving consequential directions on the Order of the Lord Chancellor, which declares the petitioner to be equitable mortgagee. The Lord Chancellor would have stayed that Order, had he thought it just to do so. But, now the petition is referred back to the Court, we must ask the Court to declare whether the Order of the Lord Chancellor, either by itself, or connected with other circumstances, will warrant the Court in withholding from the

petitioner the benefit of the Lord Chancellor's Order. Have the assignees taken any steps towards the prosecution of the appeal, since the decision of the Lord Chancellor of the 20th January? All that they say, in excuse for a delay of more than three months, is, that their intention to proceed with it depends upon the contingency of getting the consent of all the creditors. And then again another difficulty is started by them, as to the applicability of the Orders of the House of Lords to an appeal of this description. The petitioner has now for three years been kept out of his money; and the Court will not, for such unsatisfactory reasons as have been assigned by the assignees, add still further to the delay.

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Sir JOHN CROSS.—This case was three years ago before this Court, and has since been before the Lord Chancellor on appeal. By the Order of the Lord Chancellor, the case was referred back for the investigation of this Court, as to the amount of the debt due to the petitioner; and now it has come again before us, we are bound to hear the application, and make such order as we think right. The assignees, however, object to our proceeding with the case, not alleging that we are incompetent to do so, but that we have a discretion to exercise in deciding whether we shall or not. They say, they have a *bonâ fide* intention to prosecute an appeal; and therefore the Court can make no Order; and they refer to the practice of Courts of Law, with respect to writs of error. But did any one ever hear of a counsel getting up in a Court of Law, and asking the Court not to proceed in giving judgment in a case, because there was an intention merely to sue out a writ of error? If a

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writ of error be actually sued out, then the proceedings are at once stopped as a matter of course; but I never heard of an instance of a Court of Law staying proceedings, because an intention of issuing a writ of error existed in the mind of a defeated suitor. Such, however, is the present case; for no appeal is actually pending. It is true, leave to appeal has been obtained; but so far as we can learn, not a single step has been taken towards presenting a petition of appeal. All the assignees venture now to say is, that they intend to appeal, if the creditors will give their assent. More than three months have already elapsed, and their minds are not yet made up; and we know not how long they may require for that purpose. Now, when the Lord Chancellor gives liberty to appeal, must not that appeal be prosecuted in a reasonable time? The petitioner, a merchant, has been kept out of his property,—for such the Lord Chancellor has now declared it to be—for a period of three years; and the assignees have thought proper to invest the money,—a matter of some surprise to me, I confess,—in a country bank in Scotland, out of the jurisdiction of this Court. Why this should have been done, I am at a loss to conceive. If the petitioner is a person to be trusted with the money, and there is no question about that, it seems to me that the Court might very properly, in the exercise of its discretion, order the money to be handed over to him, unless the assignees can show that it would be attended with risk and danger to the estate. If there should be an appeal, and the assignees should prove successful, the petitioner must of course refund the money. But it appears to me, if the assignees take a right view of the Standing Orders of the House of Lords, that they have allowed the time for appealing to pass by

altogether; and if an Order of the Lord Chancellor sitting in bankruptcy is not to be treated as a decree of a Court of Equity, and so not provided for by those Orders, there is no knowing how long it may be before the appeal is prosecuted. There are, however, three questions put to us to determine, 1st, Whether the obtaining leave to appeal is, *per se*, a stay of proceedings; and I think we are all agreed upon that point, that it is not; 2ndly, Whether there is a *bond fide* intention on the part of the assignees to prosecute the appeal, and 3rdly, Whether a reasonable time has not already elapsed. As to the 2nd point, I should like to see that the assignees have taken some step, from which I could collect that they had a real intention to go on with the appeal; for as yet, there is nothing from which I can infer such intention. Then, as to the 3rd point, three months and more have expired, without any thing being done. And there is nothing now but a vague statement, that if the consent of creditors can be obtained, it is the wish of the assignees to prosecute the appeal; and the fulfilment of which wish would seem to depend upon another contingency, namely, whether the opinions of Scotch lawyers are favourable to the claims of the assignees. It is very doubtful, also, whether the House of Lords will at this period of time receive the appeal. Under all the circumstances, therefore, I am inclined to make an Order for the payment of this money to the petitioner.

Sir GEORGE ROSE.—There really appears to me no difficulty in making a proper arrangement between the parties to this petition. No doubt, the regular course would have been for the assignees to have made an application to the Lord Chancellor for a stay of proceed-

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ings, when the leave to appeal was granted; and he would then have limited the assignees to a given period of time for the prosecution of the appeal. Yet, although the pendency of the appeal is, without such Order, no stay of proceedings, how it should operate upon our discretion in making any Order upon this petition, is a very different matter. We are asked now to stay proceedings, not because an appeal is actually pending, but on the strength of circumstances involved in this petition. It is suggested by the assignees, standing in the situation of trustees for the body of creditors, that this Court, by making any Order at the present moment for the payment of this money to the petitioner, might be doing that, which would hereafter have to be set aside; and that the money might be lost to the estate, if the judgment on the appeal should prove adverse to the petitioner. On the other hand, we are called upon by the petitioner to make an Order for the payment of that, which may turn out not to belong to him. We are told by the petitioner's counsel, that the Lord Chancellor had no doubt that the property in question belonged to the petitioner, as equitable mortgagee; but, in sanctioning an appeal to the House of Lords, the Lord Chancellor may have felt that it was not proper to conclude so important a question as that of international law, by the proceeding of petition in bankruptcy. The appeal, therefore, must be considered, not as the mere act of the party, but as a proceeding taken with the approbation of the Lord Chancellor. All that I feel is, not that we should dismiss the present petition, but that under the existing circumstances we should defer giving the directions which the petitioner asks. The assignees, by their counsel, state that they have the intention of prosecuting

this appeal; and I think we ought to give credit to them in making that statement, upon a question of so much nicety and importance, and that some little delay must be allowed for. If we are pressed for an Order on this petition, we ought to direct that the money should be invested, as well as the amount of the dividend of 2s. 6d. in the pound which the petitioner has received on his debt, subject to the future Order of this Court on the determination of the appeal. But, before we decide the matter either one way or the other, I should wish to be satisfied that there is a *bonâ fide* intention to appeal; and would propose, therefore, that the assignees should within a limited time state decidedly, whether they will prosecute the appeal or not. A fortnight appears to me a reasonable time for that purpose. But the money ought to be paid into Court, verified by affidavit.

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Mr. *Russell* undertaking to give a definitive answer by the last day of term, whether the assignees would prosecute the appeal or not,

The petition was ordered to stand over till that day.

Mr. *Russell* now stated, that the assignees had determined not to proceed with the appeal, and were willing to submit to the common Order. May 13th.

Mr. *Swanston*, and Mr. *Anderdon*, objected to the common Order being made; as that would throw the burthen of all the costs upon the produce of the mortgaged property. Extraordinary costs have been incurred by the litigious spirit of the assignees. They

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have not pursued the course of ordinary trustees, and merely submitted their rights to the judgment of the Court, but have acted as hostile parties. Therefore the costs of the appeal to the Lord Chancellor, and the subsequent costs incurred in applications to this Court, ought not to be thrown on the mortgaged funds, but on the general estate of the bankrupts.

Mr. J. Russell. The petitioner has made a proof for the entire debt secured by the mortgage, and has received dividends in respect of such proof. He could not, therefore, obtain an Order that the proceeds of the security should be paid over to him, unless the assignees were brought before the Court, for the purpose of having his proof expunged, and refunding the dividends which he has received.

The COURT said, that the costs of the appeal and of this application ought to come out of the general estate, and that the other costs should come out of the mortgage fund.

The ORDER was, that the proof of the petitioner should be expunged; but that he should be at liberty to retain the dividend received by him on such proof, amounting to 240*l.* 18*s.* 2*d.*, in part satisfaction of what should be found due to him on taking the account of the principal and interest due to him on his mortgage. That out of the sum of 1305*l.* 3*s.* 3*d.*, which was admitted to be in the hands of the assignees, as the proceeds of the property which had been sold by mutual consent, the costs of the assignees, and

of the petitioner, in respect of taking up the title to the property, and of the sale thereof, and incidental thereto, and also the costs of the petitioner and the assignees of the original petition, and likewise the costs of the petitioner of the appeal, and of this application, should be paid by the assignees; and that out of that sum the assignees should retain the said sum of 240*l.* 18*s.* 2*d.* received by the petitioner on his proof. That if, upon taking the account, the debt due to the petitioner should be found to exceed what should remain of the sum of 1305*l.* 3*s.* 3*d.*, then that the residue should be paid to the petitioner; or, in case a less sum than such residue should be found due to him, then that what should be found due should be paid out of such residue, and that the ultimate residue should be applied and disposed of by the assignees, as part of the joint estate of the bankrupts; and that in case what should be so found due should not be fully paid out of such residue, then the petitioner was to be admitted a creditor under the fiat for the residue of his debt.

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Ex parte EDWIN LEAF and others.—In the matter
of JOHN SIMPSON and JAMES WINDROSS.

Westminster,
Jan. 15th.

THIS was a petition of creditors, praying that certain monies might be declared to belong to the joint estate.

At the death of one of two partners, a considerable balance be-

longing to the partnership is in the hands of their bankers, a specific portion of which the surviving partner draws out and hands over to sureties for the completion of a previous arrangement for the purposes of the partnership, upon the understanding that if the arrangement is not carried into effect, the money shall be returned. The arrangement is not completed, and the surviving partner becomes bankrupt, the money still remaining in the hands of the trustees. *Held*, that the money belonged to the joint estate of the two partners, and not to the separate state of the surviving partner.

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The two bankrupts carried on business in co-partnership with one *George Dawson* since deceased, as linen-draper in London. On the 17th October 1834 that partnership was dissolved by the retirement of *Simpson*, and the business was continued under the firm of "*Dawson and Windross*," who agreed to take all the assets, and pay all the debts of the old firm. Among these debts were various outstanding acceptances of the old firm for the accommodation of *Bentley, Dear and Co.*, who were declared bankrupts in September 1834. On the 24th November 1834, *Dawson and Windross*, being unable to fulfil the above engagement, proposed to the creditors of the old firm to sign an agreement, by which it was stipulated that the creditors should "give them time from week to week for payment of their several debts, in respect of the several bills therein specified, upon the condition that they (*Dawson, Simpson, and Windross*) would pay weekly 200*l* into the hands of *Vere, Supte & Co.* in the names of *Evans, Clarkson, and Allan*, to be held by them on trust to be distributed, according to an equal pound rate upon their several debts, among the several creditors signing, as and when such weekly payments should be sufficient to pay 2*s.* 6*d.* in the pound upon the aggregate of the debts, including in such distributions the assignees of *Bentley, Dear & Co.* for the sum of 2000*l.*; the creditors giving credit to *Dawson & Co.* for dividends received from the estate of *Bentley & Co.*"

On the 10th December 1834 *Dawson* died; after which *Windross* continued the business, still under the firm of *Dawson and Windross*, until the 31st December 1834. At *Dawson's* death, some of the creditors had

signed the above agreement, and negotiations with others were still pending; and at that time a considerable balance, the property of *Dawson and Windross*, was in the hands of *Jones, Loyd & Co.*, as their bankers. On the 18th December 1834, *Windross*, in expectation that the proposed agreement would be signed by all the creditors, drew 400*l.* from *Jones, Loyd & Co.*, and paid the same into the hands of *Allan and Simpson*, upon the terms mentioned in the following letter:—

“To Mr. *Thomas Allan* and *John Simpson*,

18th December 1834.

“Dear Sir,

“Inasmuch as the arrangement for the trust account will, we expect, be completed in the course of a few days, we have to-day paid into the hands of *Vere, Sapte & Co.* 400*l.*, in the joint names of yourself and Mr. *John Simpson*, on the understanding, that in the event of that arrangement not being carried into effect, you jointly agree to return the money to us in full; and when completed, the same sum to be transferred to the credit of the trust account, as stated in the deed.

We are, &c.

Dawson and Windross.”

On the 24th December 1834, *Windross* paid a further sum of 200*l.*, part of the funds of *Dawson and Windross*, into the hands of *Allan and Simpson*, upon the like terms. The creditors rejected the proposed arrangement; and on the 31st December 1834 a fiat issued against *Simpson*, as surviving partner of the firm of *Dawson and Windross*. On the 6th January 1835 a joint fiat also issued against *Simpson and Windross*, as surviving partners of *Dawson, Simpson, and Windross*. The 400*l.*

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and 200*l.* at that time remained in the hands of *Allan* and *Simpson*. There was other property belonging to the estate of *Windross*, derived from his separate effects, and not connected with the funds of *Dawson* and *Windross*.

The Commissioners had directed that the two sums of 400*l.* and 200*l.* should be considered as the separate estate of *Windross*, and distributable as such among his separate creditors; and his assignees were about to make a dividend.

The prayer was, that these two sums of 400*l.* and 200*l.* might be declared to be the joint property of *Dawson* and *Windross*, and be divided accordingly, and that any dividend in respect thereof under the separate estate of *Windross* might be stayed.

Mr. Bethell. The question in this case arises out of the administration of the assets under the several fiats; and what the Court will have to decide is, to which estate the two sums of 400*l.* and 200*l.* remaining in the hands of *Allan* and *Simpson* belong; whether to the joint estate of *Dawson* and *Windross*, or to the separate estate of *Windross*. The separate creditors of *Windross*,—whose debts were contracted by him before, as well as since, the death of *Dawson*,—contend that they are exclusively entitled to this money, as the separate estate of *Windross*; while the petitioners, on the behalf of the joint creditors, insist that these two sums still remained the joint property of *Dawson* and *Windross*, and are therefore distributable amongst the joint creditors of that firm. The letter of the 18th December 1834, which was written by *Windross* to the parties with whom the

money was deposited, is an important document for the consideration of the Court; for upon that letter the whole case depends. It will be observed, that that letter was written in the name of the partnership, and refers to the arrangement which had been proposed by *Dawson* and *Windross*, before the death of *Dawson*. When the case was before the Commissioner, he held that this money was in the order and disposition of *Windross* at the time of his bankruptcy, and therefore belonged to the separate estate of *Windross*. But we submit, that the Commissioner was wrong, and that the money must be considered as the joint property of *Dawson* and *Windross*.

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Mr. *Anderdon* for the separate creditors. After the death of *Dawson*, although *Windross* continued to carry on the business in the joint names of *Dawson* and *Windross*, yet all the monies of the firm in the hands of their bankers became the sole property of *Windross*, as surviving partner. [Sir *John Cross*. Do you mean to say, that at the death of *Dawson* his executors had no interest in the money lying in the banker's hands?] The executors of *Dawson* may have a right to an account, as against *Windross*; but they have no claim to this specific property, which at his death became the separate fund of *Windross*, as surviving partner. If we were to trace back the proprietorship of this fund, there is little doubt that we should be able to show that it constituted the property of *Dawson*, *Simpson*, and *Windross*. At the bankruptcy of *Windross*, however, it is found in his order and disposition, and therefore passes to his assignees. The letter in question also was written after the death of *Dawson*, and the deposit of the money made exclusively by *Windross*. [Sir *John Cross*. The property must not only

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be in the order and disposition of the bankrupt, but with the consent of the true owner. Now, who would you say is here the true owner?] *Windross* was the true owner, as surviving partner. [Sir *John Cross*. Does not your argument go to this length, that if *A.* and *B.* are partners, and *A.* dies to-day, and *B.* to-morrow becomes bankrupt, all the partnership property will belong to *B.*'s separate estate, and the joint creditors have no remedy?] The same principle would apply, certainly, whether it be a year, or a day, between the events of death and bankruptcy. Suppose a year should elapse before the bankruptcy of the surviving partner, can it be contended that the property then found in his hands is to be dealt with as the joint property of the former firm? In the present case, the bankruptcy of *Windross* having taken place three weeks after the death of *Dawson*, the property in question must be taken to be the separate estate of *Windross*, and as such to belong to his separate creditors.

Mr. *Bethell*, in reply, was stopped by the Court.

Sir *JOHN CROSS*.—The first part of this case, which relates to the original partnership of *Dawson*, *Simpson*, and *Windross*, is wholly immaterial to the decision of the present question. After *Simpson* retired from the concern, *Dawson* and *Windross* were partners; and we find that the sum of 600*l.* was in the hands of their bankers, and standing in their joint names, at the death of *Dawson*. This money was drawn out of the bank by *Windross* for a particular purpose, and handed over by him to *Allan* and *Simpson*, upon condition that they should return it, if a certain arrangement, which had been entered into between *Dawson* and *Windross* and their creditors, should not be carried into effect. Before this arrangement was

completed, *Windross* became bankrupt. In this state of circumstances, how can it be said that this property was in the order and disposition of *Windross* alone? To establish the bearing of the law of order and disposition and reputed ownership, which I have always considered as a law of forfeiture, it is necessary to make out a strong case against the true owners. Now, the true owners of this property, at the death of *Dawson*, were his representatives and *Windross* the surviving partner. For, though a surviving partner may sue alone, as such, yet that does not vest in him the sole right to the subject matter recovered by that suit; and *Windross* at most, stood in the position of a trustee for himself and the representatives of *Dawson*. To hold that this was the separate property of *Windross*, would lead to the monstrous conclusion, that if one of two partners dies, the whole of the partnership property goes to the survivor. I am clearly of opinion, that these two sums belong to the joint estate of *Dawson* and *Windross*.

Sir GEORGE ROSE.—I am also of opinion, that the two sums of 400*l.* and 200*l.* must be distributed among the joint creditors of *Dawson* and *Windross*. At this time of day, I confess it appears to me somewhat strange, that a doubt should exist in the mind of any one, as to the mode of distribution of partnership assets, upon the death of one of the partners. We are able here to trace a specific sum, as forming part of the partnership funds of *Dawson* and *Windross*, just like the case of a bale of goods, or any other property that you can earmark and follow; and it must be distributed therefore among their joint creditors.

ORDER as prayed.

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*Westminster,  
January 24th.*

Where the bankrupt had been employed as a broker by the petitioners to sell a parcel of goods, and secretly agreed with the buyer to share the profit or loss of the transaction, in lieu of brokerage, and part of the goods remained in the bankrupt's hands at the time of his bankruptcy; *Held*, that the transaction was fraudulent, as against the petitioners, and the sale void; and that the assignees were bound to deliver up to the petitioners the remaining portion of the goods.

Ex parte FREDERICK HUTH and others.—In the matter of BUSICK RICHARD PEMBERTON.

THIS was a petition to have certain goods restored to the petitioners, which had been taken possession of by the assignees under the following circumstances.

The bankrupt, together with *Thomas Daniel Meriton*, since deceased, carried on business in copartnership as wool-brokers in the city of London, under the firm of *Pemberton and Meriton*; and in April 1839, the petitioners employed them as brokers to sell a quantity of wool. On the 8th of April *Pemberton and Meriton* represented to the petitioners, that they had contracted for the sale of sixteen bags of the wool to Messrs. *Roberts and Ledger* of Leeds, merchants, and they sent to the petitioners the following sold contract as being the agreement which they had made.

“ London, 8th April 1839.

Messrs. *Frederick Huth* and Co.

WE have this day sold by your order, and for your account, to Messrs. *Roberts and Ledger* of Leeds, sixteen bales of German wool (*viz.*):—(the numbers, marks and prices of the different bales were here specified.) Customary allowances for tare and draft, payable as follows: by their acceptance to our draft, half the amount at three months from the date of contract, less  $3\frac{1}{2}$  per cent. remaining, half at four months from 8th May, less  $2\frac{1}{2}$  per cent discount,—and remain,

Your obedient servant,

*B. R. Pemberton* and Co.

Brokerage one per cent.

Guarantee one per cent.”

Before any payment became due under the terms of this contract, a fiat, bearing date the 26th of June 1839, was issued against *Pemberton*, shortly previous to which event *Meriton* died. *Roberts* and *Ledger* afterwards stopped payment, and no money whatever had been received by the petitioners under the above contract.

Since the issuing of the fiat, the petitioners discovered that the sixteen bales of wool were not, as was represented to the petitioners, *bonâ fide* sold by *Pemberton* and *Meriton* to *Roberts* and *Ledger*; but that, in fact, *Pemberton* and *Meriton* entered into an agreement with *Roberts* and *Ledger* to take the wool on a partnership account between them, and accordingly the bought contract sent to *Roberts* and *Ledger* had added to it the words following, that is to say, "It is agreed, that we join at profit or loss upon the above, in lieu of brokerage." This agreement was concealed from the petitioners, who believed the wool had been *bonâ fide* sold to *Roberts* and *Ledger*. The delivery order for the wool was made out to the order of *Roberts* and *Ledger*, but was indorsed by them and handed over to *Pemberton* and *Meriton*, who in fact took possession of the wool and sent it to a certain manufactory which they occupied at Trowbridge, in the county of Wilts. When *Pemberton* was declared bankrupt, nine of the sixteen bales of wool remained in his hands at his premises in Trowbridge, and were taken possession of by his assignees; but the other seven bales had been in some manner sold or disposed of by him.

The petitioners alleged, that the bills of exchange given to them under the above contract were unpaid and still

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in their hands, and that they had not received any sum of money or other consideration whatever, for the sale of the wool. The assignees claimed the nine bales of wool, as part of the bankrupt's estate; but the petitioners submitted that they were their property, and that the contract was a fraud upon the petitioners. Some monies, it was alleged, were still due and owing in respect of the sale by the bankrupt of the remainder of the wool.

The prayer was, that it might be declared that the petitioners were entitled to have such of the sixteen bales of wool, as were in the possession of the bankrupt at the time of his bankruptcy, and had been taken possession of by his assignees, restored and delivered up to them; and that an account might be taken of the residue of the sixteen bales of wool, and the disposal thereof; and, in case it should appear that any sums were at the time of the issuing of the fiat outstanding and unreceived by the bankrupt, in respect of his disposal of the wool, or any part thereof, then that it might be declared that the petitioners were entitled to receive the same, or to prove for the amount of any deficiency.

Mr. *Bethell*, in support of the petition. As the bankrupt was employed in the character of broker to sell the wools, it was a fraud, on his part, to be in any way concerned in the purchase of them on his own account, and the sale was therefore void in the eye of the law. Then, whatever portion of the wool remained in the possession of the bankrupt at the period of his bankruptcy must be considered as the property of the petitioners, and as being in the hands of their broker for the purpose of sale, but remaining unsold. In *Ex parte Dyster* (a) Lord

(a) 2 Rose, 354.

Eldon expresses himself very strongly upon the conduct of a party acting as broker and principal in the same transaction. "A contract," he says, "arising out of such conduct would, without reference to any act of parliament, or other regulation, but upon the principles of common law, be good for nothing. No action could be maintained upon a transaction so fraudulent. A broker is to be considered either as the agent of the seller or the buyer, or of both, bound honestly to exercise his skill, and fairly to communicate his opinion on the subject of the purchase to those, who for that purpose have confidentially employed him; and it requires little observation to show, how disqualifying a circumstance to the fair discharge of that duty will arise, from the interference of his own interest."

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Mr. *Swanston*, and Mr. *Anderdon*, for the assignees. If the petitioners have any claim, they ought not to have come to this Court, but to have gone to a Court of Law. This is a claim of adverse right, paramount to the fiat; and this is not the proper tribunal to try that question. We say, that the agreement to share in the profits of the sale of the wool was a distinct transaction subsequent to the contract of sale. [Sir *George Rose*. The *onus* lies on you to show, whether the agreement to share in the profits was before, or after, the contract of sale. I quite agree, that the petitioners must prove their case, as in an action at law.] There is a distinction between the *sold* note, and the *bought* note, in this case. In the latter, the memorandum of the agreement appears to have been made, after the transaction of the sale was complete. If that be so, there is an end of the petitioners' case. The

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bought note would convey no terms of the sale. The broker cannot charge commission to both parties. If the petitioners brought an action at law against the assignees, *Roberts* would not be an admissible witness; for he would have an interest in the result; as, if the wools were delivered up to the petitioner, the bills of exchange accepted by *Roberts* and *Ledger* must be delivered up by the petitioner, and thus release *Roberts* and *Ledger* from any liability on the bills.

Mr. *Cameron* appeared for *Roberts* and *Ledger*.

Sir JOHN CROSS.—There is some obscurity with respect to the exact facts of this case. It appears now, that the wool was sent by *Pemberton* and *Meriton* to *Trowbridge* to be sold, and not manufactured. It seems clear, however, that the understanding between the bankrupt and *Roberts* and *Ledger* was, that *Roberts* and *Ledger* and the bankrupt were to be considered as the joint purchasers of the wools. Now, the bankrupt, standing in the character of broker, had no authority to enter into such a contract as is here disclosed. This was unquestionably a fraud, as against Messrs. *Huth*. As it was therefore a transaction not justified in point of law, I am of opinion that the petitioners have a right to consider it as void, and are entitled to have the nine bales of wool delivered up to them, which were in the possession of the bankrupt at the time of his bankruptcy.

Sir GEORGE ROSE.—Unless we saw clearly that the petitioners, adducing such evidence as would be receivable in a Court of Law, would be entitled to relief in a Court of Equity, they would beyond all doubt have no



right to come for relief to this Court, which administers justice in bankruptcy by the rules of equity. But, in another way of putting it,—if a party comes here seeking the delivery up by the assignees of specific chattels as his own, and stating that if not delivered up, he will be entitled to prove under the fiat, this Court has, at any rate, jurisdiction to entertain the question of right, connected as it is with the question of proof. How far it will deal with it is another matter. In this case, the property in question came to the hands of the bankrupt in his character of broker; and it remains in his hands at the time of his bankruptcy. Then the question arises, how far the character of broker and agent has been extinguished by the ostensible sale to *Roberts* and *Ledger*. Now if the bankrupt, being employed in this transaction as a middle man between the buyer and seller, takes upon himself to act as a principal, I have no hesitation in saying that the contract is good for nothing. There is an agreement here between the broker and the ostensible purchasers of the wool, that the broker should, in lieu of his brokerage, be paid out of the profits of the transaction. The words of the memorandum appearing on the face of the bought contract convey to my mind the impression, that the memorandum was written at the very time of the sale, and was not a distinct transaction subsequent to the contract of sale, as is contended by the counsel for the assignees. If it went no farther, I should be inclined to say that the contract was fraudulent. But it does not rest there. The assignees might have examined *Roberts*, or *Ledger*, if they had chosen, to show that the agreement they made with the bankrupt to join in the profit of the transaction was made subsequent to the sale of the wools. But they have not


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thought proper to examine either *Roberts*, or *Ledger*, as to this point. And *Roberts* has made an affidavit, expressly stating that the agreement to share the profit was a pre-existing contract. As to the inadmissibility of *Roberts's* evidence in an action at law against the assignees, on the ground that he would have an interest in the result,—if the wools were ordered to be delivered up, the answer is, that the very action itself, whatever the result might be, would destroy all title of the petitioners to the bills; and thus *Roberts* would stand a perfectly disinterested witness between the parties to the action. I apprehend, therefore, that the petitioners must be declared to be entitled to such of the wool as was in the hands of the bankrupt at the time of his bankruptcy, and the assignees must be directed to deliver it up to the petitioners.

ORDER as prayed.



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### ACT OF BANKRUPTCY.

(*Under 1 & 2 Vict. c. 110. s. 8.*)

By 1 & 2 *Vict. c. 110, s. 8.* if any two or more creditors, being partners, whose debt amounts to 100*l.*, or upwards, shall file an affidavit in the Court of Bankruptcy, that such debt is justly due to them, and that the debtor is a trader, and shall cause him to be personally served with a copy of such affidavit, and with a no-

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tice in writing, requiring immediate payment of the debt, and such trader shall not, within twenty-one days after personal service of such affidavit and notice, pay, or secure, or compound for the debt, or enter into a bond in such sum with two sufficient sureties, as a Commissioner of the Court of Bankruptcy shall approve of, such trader shall be deemed to have committed an act of bank-

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ruptcy on the twenty-second day after service of such affidavit and notice, provided a fiat shall issue within two calendar months from the filing of the affidavit.

Under this statute it was held, that one partner may make the affidavit, without the others joining in it. *Ex parte Rhodes, re Rhodes*, 4 Deac. 125; S. C. Mont. & C. 319.

The affidavit being for a debt of 100*l.* and upwards, and the notice in respect of a debt of 3612*l.*, the Commissioner ordered the trader to enter into a bond for 200*l.*; upon which the petitioning creditor filed another affidavit for the real debt of 3612*l.*, and delivered a fresh notice; but no security being given, in respect of such last mentioned affidavit and notice, within the twenty-one days, a fiat was issued against the trader. *Quære*, whether a fiat could legally issue on such second affidavit and notice. *Quære*, also, whether the day, on which the affidavit and notice are served on the trader, is not to be reckoned one of the twenty-one days. *Ibid.*

Under the above statute it has been also held, that, in adjudicating on the act of bankruptcy, the day of filing the affidavit is to be reckoned the first day of the two months. *Ex parte Whitby, re Whitby*, 4 Deac. 139; S. C. Mont. & C. 671.

(*Evidence of.*)

Where a petitioning creditor, having ascertained that an agent in his

service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat: *Held*, that the deposition then made was evidence of the act of bankruptcy, as against such creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue. *Gardiner v. Moul*, 10 Adol. & E. 464; S. C. 2 Per. & D. 403.

(*Fraudulent Sale.*)

Goods were sold by defendant, as agent of C., in contemplation of C.'s bankruptcy, for the purpose of raising money for defendant and C.; the buyer did not know the sale to be fraudulent. *Held*, that such sale was not an act of bankruptcy by C. *Harwood v. Bartlett*, 6 Bing. N. C. 61; S. C. 8 Scott, 171.

(*Fraudulent Conveyance.*)

A conveyance by a trader of part of his property for the benefit of his creditors, is not an act of bankruptcy, unless executed under circumstances of fraud; and mere conjecture of fraud, arising from extrinsic circumstances, will not be sufficient to affect the title under such conveyance. *Cattell v. Corral*, 4 Younge & C. 228.

(*Relation to.*)

See RELATION TO ACT OF BANKRUPTCY.

ACTIONS AND SUITS.

(*By and against the Bankrupt.*)

See BANKRUPT.

(By Assignees.)

(Trover.)

The protection given by the stat. 2 & 3 Vict. c. 29. s. 1. to contracts with bankrupts and executions against their property, *bond fide* executed or levied before the date and issuing of the fiat, is not receivable in evidence in an action of trover by the assignees against an execution creditor, either under the plea of "not guilty," or a plea that the plaintiffs were not lawfully possessed of the goods, as assignees, at the time of the alleged conversion. *Byers v. Southwell*, 9 Car. & P. 320.

*Semble*, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Ibid*.

The defendant, by indenture, demised to *E. and W.* a fulling mill for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that, at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons, chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor; but, if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease, the lessees became bankrupt, and their assignees declined to take the lease; but they required the defendant to appoint a

person to value the machinery; and, on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupt) at a sum exceeding the original valuation. The assignees then delivered possession of the premises to the defendant; and demanded of him the difference between the two valuations, which he refused to pay. *Held*, that the assignees (having demanded the machinery) were entitled to recover it in trover; and that their remedy was not by an action on the covenants, which had been determined by the bankruptcy, and by their refusal to take to the lease. *Fairburn v. Eastwood*, 6 Mee. & W. 679.

(Proof of Requisites.)

In trover by assignees, laying the possession in themselves, as assignees; pleas, that the plaintiffs are not assignees, and were not possessed as assignees, put in issue, the trading, the petitioning creditor's debt, and the act of bankruptcy; and these must be proved, if notice to dispute them be given. It is not enough to prove the fiat and assignment to the plaintiffs. *Buckton v. Frost*, 8 Adol. & E. 844; S. C. 1 Per. & D. 102.

(Immaterial traverse.)

Trover by assignee of bankrupt for goods of the plaintiff, as assignee, laying a conversion by three defendants *G., R. and P.* Pleas by defendants *R. and P.*, that after the

bankruptcy, and two calendar months before the fiat, the plaintiff, as assignee, to wit, by the relation of his title to the act of bankruptcy, though not then appointed assignee, was owner, and entitled to the possession, of the goods, and the bankrupt was possessed of them, subject to such title of the plaintiff; that two calendar months before the fiat, the defendant *R. bonâ fide* bought of the bankrupt, who then *bonâ fide* sold and delivered to *R.* the said goods at a reasonable price, and that at the time of the sale, neither of the defendants had notice of any prior act of bankruptcy, whereby *R.* became possessed of the goods as of his own property; and that he, being so possessed, and *P.*, as his servant, converted them; which is the same grievance, &c.; *without this*, that, at the time of the said conversion, the goods were the property of the plaintiff as assignee. Conclusion to the country. *Held*, on special demurrer to the plea, that the introductory part of it confessed and avoided the declaration; and the traverse was therefore idle. *Quære*, whether the plaintiff might have treated the traverse as immaterial, and pleaded over. *Pearson v. Rogers*, 9 Adol. & E. 303; S. C. 1 Per. & D. 302.

(*Amendment.*)

To *scire facias* by the assignees of a bankrupt on a judgment, the defendant pleaded, 1st. Denial of the bankruptcy; 2nd. Satisfaction to the bank-

rupt; on which pleas issues were joined. The Court permitted the proceedings to be amended, on payment of costs, by joining the official assignee (who had been inadvertently omitted as a co-plaintiff), though the application had been delayed a year and a half after the issuing of the writ; the defendant being allowed to plead *de novo*. *Holland v. Phillips*, 10 Adol. & E. 149; S. C. 2 Per. & D. 336.

(*Effect of Assignment on Action previously commenced.*)

To assumpsit for goods sold and delivered, it is a good plea in bar of further maintenance of the action, that after action commenced, plaintiff took the benefit of the Insolvent Debtors' Act, 7 Geo. 4. c. 57., and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee. And a replication to such plea, that, after assignment, the provisional assignee had notice of such suit, and permitted it to continue, until he afterwards (and after the plea pleaded) assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors, and that it was so continued with their consent, and on their behalf, by such assignees;—*Held* bad, on general demurrer. *Swann v. Sutton*, 10 Adol. & E. 623; S. C. 2 Per. & D. 533.

(*By Assignee under second Commission against Assignee under a subsequent Fiat.*)

The 6 Geo. 4. c. 16. s. 127., which enacts, that if any person, who shall have been discharged by a certificate, shall become bankrupt, and have obtained, or shall hereafter obtain, such certificate, unless his estate shall pay 15s. in the pound, his future estate shall vest in the assignees under the second commission, does not apply, where the second certificate was obtained before the act. Therefore, where *A.* had obtained his certificate under a second bankruptcy, before the 6 Geo. 4. c. 16., it was held a valid defence to an action of trover (brought by the assignee under the second commission against the official assignee under a subsequent fiat,) that the goods were in the disposition of *A.*, at the time he became a bankrupt under the fiat, as reputed owner, whereupon the defendant, as such official assignee, took and converted the same for the benefit of *A.*'s creditors, notwithstanding *A.* had not paid 15s. in the pound under the second commission. *Benjamin v. Belcher*, 3 Per. & D. 317; S. C. 11 Adol. & E. 250.

(*Evidence in.*)

The fact, that, after the fiat had been sued out, certain creditors of the bankrupt delivered up to the assignees goods which they had received from the bankrupt before the fiat, and before the delivery of certain goods

by the bankrupt to defendant,—*Held* not admissible evidence against defendant, in an action of trover brought against him by the assignees. *Backhouse v. Jones*, 6 Bing. N. C. 65; S. C. 8 Scott, 148.

(*Against execution Creditor.*)

Trover does not lie for the assignees of a bankrupt against a creditor, who sues out execution under a warrant of attorney not filed within twenty-one days, if the execution be completed before the act of bankruptcy. The remedy is by an action for money had and received, or by a special action on the statute 3 Geo. 4, c. 39. *Brook v. Mitchell*, 6 Bing. N. C. 349.

(*Set off in.*)

Upon a dissolution of partnership, defendant agreed to pay his copartners 6817*l.* 9*s.* 8*d.*, as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891*l.* 12*s.* due from the firm to *H.* After the dissolution, they became bankrupts, and never paid *H.* *Held*, that in an action by their assignees for the 6817*l.* 9*s.* 8*d.*, the defendant could not set off their undertaking to pay the 51,891*l.* 12*s.* to *H.* *Abbott v. Hicks*, 5 Bing. N. C. 578; S. C. 7 Scott, 715.

To an action by assignees of a bankrupt for the price of a phaeton, for which defendant had agreed to pay ready money, defendant pleaded a set-off, in respect of a bill of exchange drawn by *H.*, accepted by

the bankrupt, and indorsed by *H.* to defendant. Plaintiffs replied, that after the bill was dishonoured *H.* indorsed it to defendant without consideration, in trust that defendant should purchase the phaeton of the bankrupt, hand it over to *H.*, and fraudulently attempt to set off the bill against the price of the phaeton. *Held*, a sufficient answer to the claim of set-off. *Lackington v. Combes*, 6 Bing. N. C. 71; S. C. 8 Scott, 312.

*(Relation to Act of Bankruptcy.)*

*D.*, being captain of a ship bound to the East Indies, and proprietor of the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On the 18th October, while the ship was on her voyage home, *D.*, being indebted to the owner, gave him a written order as follows:—"I hereby authorize you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th December; and a fiat in bankruptcy was issued against *D.* on the 18th, on an act of bankruptcy committed on the 2nd. *Held*, that *D.*'s assignees could not recover against the owner, in trover for the cabin furniture. *Belcher v. Oldfield*, 6 Bing. N. C. 102; S. C. 8 Scott, 221.

*(Money had and received.)*

One *D.* proposed to make a com-

position with his creditors, paying them 8s. in the pound on their respective debts, they releasing him from all claims and demands in respect of such debts, and engaging to give up all securities held by them. Certain creditors of *D.* refused to sign the deed, unless the defendants signed it. The defendants at first refused to do so, but afterwards consented, on *D.* assigning to them, as a security for the residue of their debt, a policy of assurance for 200*l.* on the life of his mother, which he had previously placed in their hands. *Held*, that the assignees of *D.*, against whom a fiat afterwards issued, might recover from the defendants, in an action for money had and received, the money obtained by them from the insurance office on the falling of the life,—the assignment of the policy being a fraud on the rest of the creditors,—although the 8s. in the pound was not entirely paid. *Alsager v. Spalding*, 6 Scott, 204.

*(What a sufficient Defence.)*

In an action by assignees against the defendant for not delivering railway shares, pursuant to a contract made with the bankrupt; the plaintiffs having in their declaration averred, that the bankrupt before his bankruptcy, and the plaintiffs as assignees since, were always ready and willing to accept and pay for the shares; the defendant took issue upon this averment. *Held*, that the plea was sustained by



proof, that before the time fixed for the performance of the contract, the bankrupt was in a state of total incapacity to pay the price agreed on, and that his effects produced no assets to the assignees. *Lawrence v. Knowles*, 7 Scott, 381; *S. C.* 5 Bing. N. C. 399.

A contract for the sale by the defendant to the bankrupt of railway shares was to be performed on the 1st July 1835. To a declaration by the assignees for a breach of this contract, in not delivering the shares, the defendant pleaded that the assignees did not adopt the contract within a reasonable time after the bankruptcy, and averred that the contract was abandoned by mutual consent. *Held*, that the circumstance of the assignees having suffered a considerable period to elapse, without requiring the contract to be performed, was evidence whence the jury might infer an abandonment. *Ibid*.

In such a case, the assignees ought to make their election within a reasonable time; and *semble*, that what is, or is not, a reasonable time, is a question for the jury. *Ibid*.

*(Amendment.)*

A declaration in trover by the assignee of an insolvent debtor, charging a conversion in the time of the assignee, was allowed to be amended at the trial, by alleging a conversion before the insolvency; the real question to be tried not being thereby varied. *Norcutt v. Mottram*, 7 Scott, 176.

*(Evidence in.)*

In a suit by the assignee under the Insolvent Debtors' Act to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff; and he is not rendered competent by the 3 & 4 Will. 4. c. 42. ss. 26. 27. *Holden v. Hearn*, 1 Beav. 445.

*(Actions and Suits against Assignees.)*

In an action of trover, the plea that the plaintiff was not possessed, puts in issue the right of the plaintiff to the possession of the goods as against the defendant, at the time of the conversion. Therefore, in trover against assignees, such a plea lets in evidence that the goods, at the time of the bankruptcy, were within the order and disposition of the bankrupt, as reputed owner (according to the 6 Geo. 4. c. 16. s. 72.), and that the defendant thereupon, as assignees, sold the goods. *Isaac v. Belcher*, 5 M. & W. 139, overruling *S. C.* 8 Car. & P. 714.

*(Evidence.)*

The plaintiff, at the recommendation of B., sent goods to a dyer, who was told by the plaintiff's son that B. would give directions about them; B. called and gave directions, and afterwards became bankrupt. In trover for these goods, brought by plaintiff against bankrupt's assignees; *Held*, that the directions given by B. were admissible in evidence for the

assignees. *Sharp v. Newsholme*, 5 Bing. N. C. 713; *S. C.* 8 Scott, 21.

*(Money had and received.)*

One *R.*, possessed of a licensed public house, mortgaged the premises, together with the license. After the license had been suspended for irregular conduct on the part of *R.*, the mortgagees sold the premises, under a power of sale contained in the deed. The defendants, the assignees of *R.*, who had in the mean time become bankrupt, obtained a new license in the name of the purchaser, for which the latter paid him 150*l.* *Held*, that this was not money had and received to the use of the plaintiffs, the mortgagees. *Mannifold v. Morris*, 7 Scott, 404.

*(Costs in.)*

The assignees of an insolvent mortgagor, before a bill was filed to foreclose the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors; and by his answer he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 9 Sim. 397.

*(Pleading in.)*

In general, an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy, nor can the bankrupt obtain this relief indi-

rectly by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. *Tarleton v. Hornby*, 1 Younge & C. 172.

Where to such a bill one of the assignees demurred for want of equity, and the demurrer was allowed, *Held*, that the other assignee might plead this matter in bar of the suit. *Ibid.* 333.

*(Amendment.)*

Where an official assignee was omitted to be made a defendant, liberty was given to the plaintiffs, at the hearing, to amend the bill, by adding parties. *Wood v. Wood*, 3 Younge & C. 580.

*Quære*, whether after such an Order to amend, a plaintiff may file a supplemental bill. *Ibid.*

## ADJUDICATION.

*And see* ADVERTISEMENT.

The Court will not permit a creditor to attend by himself, or his counsel, before the Commissioners at the opening of the fiat, for the purpose of opposing the adjudication; although he swears that he believes the party is not a trader, and that the fiat is issued for an improper purpose. *Es parte Cooke, re Scholes*, 4 Deac. 78.

## ADVERTISEMENT.

Though the Court will not permit a party against whom a fiat issues to

oppose the adjudication by counsel, yet on a strong case made out by him, they will order the advertisement to be stayed, and give him leave to apply instantly to annul. *Ex parte Foulkes, re Foulkes*, 4 Deac. 44; *S. C. Mont. & C.* 68.

#### AFFIDAVIT.

On a reference to the Registrar the affidavits filed in support of the petition are receivable by him in evidence, and he is not bound to examine the parties *videlicet*. *Ex parte Smythies, re Southall*, 4 Deac. 112; *S. C. Mont. & C.* 346, 656.

(*Under 1 & 2 Vict. c. 110, s. 8.*)

A creditor, after filing an affidavit of debt to the amount of 100*l.* and upwards, under the 1 & 2 *Vict. c. 10, s. 8.*, upon which a bond was taken by the Commissioner in 200*l.*, filed a second affidavit, stating the real amount of his debt, viz. 3612*l.* The Court declined making an Order for taking the second affidavit off the file. *Ex parte Rose*, 4 Deac. 66; *S. C. Mont. & C.* 149, 334.

By 1 & 2 *Vict. c. 110, s. 8.*, if any two or more creditors, being partners, whose debt amounts to 100*l.* or upwards, shall file an affidavit in the Court of Bankruptcy that such debt is justly due to them and that the debtor is a trader, and shall cause him to be served personally with a copy of such affidavit, and with a notice in writing requiring immediate payment of the debt; and such trader

shall not, within twenty-one days after personal service of such affidavit and notice, pay, or secure, or compound for the debt, or enter into a bond in such sum with two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, such trader shall be deemed to have committed an act of bankruptcy on the 22nd day after service of such affidavit and notice, provided a fiat shall issue within two calendar months from the filing of the affidavit. *Held*, that one partner may make the affidavit, without the others joining in it. *Ex parte Rhodes, re Rhodes*, 4 Deac. 125; *S. C. Mont. & C.* 319.

The affidavit being for a debt of 100*l.* and upwards, and the notice in respect of a debt of 3612*l.*, the Commissioner ordered the trader to enter into a bond for 200*l.*; upon which the petitioning creditor filed another affidavit for the real debt of 3612*l.*, and delivered a fresh notice; but no security being given in respect of such last mentioned affidavit and notice within the twenty-one days, a fiat was issued against the trader. *Quære*, whether a fiat could legally issue on such second affidavit and notice. *Ibid.*

*Quære*, also, whether the day, on which the affidavit and notice are served on the trader, is not to be reckoned one of the twenty-one days. *Ibid.*

Under the above statute it was also held, that, in adjudicating on the act of bankruptcy, the day of filing the

affidavit is to be reckoned the first day of the two months. *Ex parte Whitby, re Whitby*, 4 Deac. 139; *S. C. Mont. & C.* 671.

#### AGREEMENT.

(*When illegal.*)

See ILLEGALITY.

#### AMENDMENT.

One of two partners, against whom a docket was struck, after being rightly named in two previous parts of the affidavit, was misnamed "Jacob," instead of "James." *Quære*, whether such an error was material. But time was given to amend, without prejudice to the rights of any other creditors. *Re Sale*, 4 Deac. 137; *S. C. Mont. & C.* 350.

#### ANNULLING FIAT.

Fiat annulled, on the ground of the party to the deed, which constituted the act of bankruptcy, being petitioning creditor. *Re Cook*, 4 Deac. 82; *S. C. Mont. & C.* 349.

Upon a petition by a bankrupt to annul a fiat issued by an attorney for the amount of his bill of costs, on the ground that the chief part of the bill consisted of charges for the prosecution of an action on the part of the bankrupt, in which he was nonsuited by reason of the gross negligence of the attorney, the Court referred it to the registrar to inquire and report as to the quantum of negligence. *Ex parte Southall, re Southall*, 4 Deac. 91; *S. C. Mont. & C.* 346, 656.

The solicitor to the petitioning creditor has an equitable lien on money in his hands belonging to the assignees, for the amount of the petitioning creditor's bill of costs: and although the solicitor might not have a right to set off the amount of such costs in an action at law by the assignees, yet this Court will not annul a fiat sued out by the solicitor against one of the assignees, on the ground that the sum so retained by the solicitor ought to be deducted from the debt on which the fiat was taken out. *Ex parte Smythies, re Southall*, 4 Dea. 118; *S. C. Mont. & C.* 346, 656.

Although, under the 42nd section of the 1 & 2 W. 4, a fiat cannot be annulled, by reason only of its being concerted between the petitioning creditor and the bankrupt, yet the Court may have regard to the fact of concert, in conjunction with the other circumstances of the case, which show that the fiat was not issued for a *bond fide* purpose. A fiat may be lawfully issued to defeat an execution, but it must not be the fiat of the bankrupt. *Ex parte Clare, re Glover*, 4 Deac. 156.

Although a fiat is annulled, the bankrupt has a right to have it enrolled of record, for the purposes of an action; and where the petitioning creditor refused to produce it for enrolment, the Court ordered it to be enrolled and the petitioning creditor to pay the costs of the application. *Ex parte May, re May*, 4 Deac. 174; *S. C. Mont. & C.* 18.

Where a bankrupt presents a petition to annul the fiat, twelve months after it issued, without showing any good cause for the delay, his petition will be dismissed. *Ex parte Forest, re Forest*, 4 Deac. 215.

Although it is no objection now to a fiat, that it is merely concerted with the petitioning creditor, yet if it is fraudulently concerted, and the object is to serve the bankrupt's own purposes, and not to benefit his creditors, —as where there are no assets to divide,—it will be annulled. *Ex parte Caldecot, re Heath*, 4 Deac. 264; *S. C. Mont. & C. 600*.

The assignee under a fiat, which is annulled for fraud, cannot have his costs against the petitioning creditor. *Ibid.*

### APPEAL.

The 32nd section of the Bankruptcy Court Act, which provides that the Order of the Court of Review shall be final, in determining any appeal touching any decision in matter of law upon the whole merits of any proof of debt, unless an appeal to the Lord Chancellor be lodged within one month from such determination, is confined in its operation to London fiats. Therefore, where the appeal is from a decision of the Court of Review on a question of proof under a country fiat, the appellant is not limited to one month for lodging the appeal. *Ex parte Fidgeon, re Fidgeon*, 4 Deac. 217.

Where, after the judgment of the

Court had been reversed on a special case by the Lord Chancellor, and the matter referred back for consequential directions, one of the parties had obtained leave from the Lord Chancellor to appeal to the House of Lords, unaccompanied by any Order as to stay of proceedings; *Held*, that this had not the effect of staying the proceedings, although it was a circumstance to guide the Court, in the exercise of its discretion, whether it would make any consequential order till the appeal was determined. *Ex parte Pollard, re Courtney*, 4 Deac. 275; *S. C. Mont. & C. 239, 253, 643*.

### APPOINTMENT.

*See* POWER.

### APPRENTICE.

Where a fiat issued against the master of an apprentice, but was afterwards annulled, by means of a composition between the bankrupt and his creditors: *Held*, that the indentures of apprenticeship were discharged. *Allen v. Coster*, 3 Beav. 274.

### APPROPRIATION.

*A.*, through the agency of *B.*, consigns goods to *C.* in India for sale, who remits bills to *B.*, directing him to pay them over to *A.*, "being a remittance to account against *A.*'s consignment of the goods," and *C.* also writes to *A.*, advising him of the remittance thus made in his favour to *B.* Before the bills reached *B.*'s

hands, he became bankrupt ; at which time *C.* was indebted to him in a large amount. *Held*, that *B.*'s assignees were bound to deliver up the bills to *A.*, and that they could not apply them towards the payment of the debt due from *C.* to *B.* *Ex parte Hankey, re Douglas*, 4 Deac. 1 ; *S. C.* Mont. & C. 1.

*H.*, a manufacturer, had been accustomed to consign goods by the agency of *O. & Co.*, commission merchants, to houses in America for sale on *H.*'s account. *O. & Co.* made advances to *H.* on the consignments, received the proceeds as his agents, and accounted to him, repaying themselves their commission, advances, and other charges. In 1831, *H.*, being indebted to *O. & Co.* for such advances and charges, and likewise owing 5000*l.* to his own bankers, wrote to *O. & Co.*, authorizing them, after paying themselves their balance out of the net proceeds of *H.*'s shipments down to that date, to pay *R. & Co.* the bankers, half the remainder of such proceeds, so that the payment should not exceed 5000*l.* *O. & Co.* therefore wrote to *R. & Co.*, stating that they, agreeably to *H.*'s authority, engaged to pay *R. & Co.* (after liquidating their own balance) a proportion of the remaining proceeds &c. (as in *H.*'s letter) in consideration of *R. & Co.* guaranteeing *O. & Co.* from claims by any other party, in consequence of such payment. *R. & Co.* then wrote to *O. & Co.*, that, understanding from *H.* that *O. & Co.* had

agreed to pay any surplus, balance, &c. (as in *H.*'s letter) they, *R. & Co.* agreed to guarantee *O. & Co.* against such other claims. A few days before this correspondence, *H.* had transmitted to *O. & Co.* a letter of authority resembling that afterwards sent, and had seen a draft of a letter from them to *R. & Co.*, like that afterwards sent by *O. & Co.* to *R. & Co.*, claiming a guarantee as above ; but the first authority was revoked, and never acted upon. In 1833 *H.* became bankrupt. The assignees gave *O. & Co.* notice, not to make any payments out of *H.*'s effects, except to them. Afterwards *O. & Co.* received proceeds of sales from the houses abroad, and paid them over to *R. & Co.*, according to the authority given by *H.* The assignees sued *O. & Co.* for the amount, as money had and received to their use. *Held*, that the transaction between *H.*, *O. & Co.* and *R. & Co.* was either a valid appropriation, or equitable assignment of funds, to the amount of 5000*l.* in favour of *R. & Co.*, and was not revoked by *H.*'s bankruptcy. *Hutchinson v. Heyworth*, 9 Adol. & E. 375 ; *S. C.* 1 Per. & D. 266.

#### ARREST.

Where an insolvent, being arrested after his discharge for a new debt, agreed, on *A.*'s becoming his bail, to give him a bond for 300*l.*, in which amount was included a debt of 80*l.* which had been inserted in the insolvent's schedule : *Held*, that the insol-

vent was not entitled to be discharged out of custody, after having been taken in execution in an action by *A.* upon the bond in which he had suffered judgment to go by default. *Denne v. Knott*, 7 Mees. & W. 143.

The registrar of the Commissioner of Bankrupts' Court is an officer of the Court of Chancery, and, as such, entitled to privilege from arrest under a *ca. sa.* *Re Collins*, 1 Sausse & Scully (Irish), 73.

But *semble*, that the Court will discountenance applications for such protection of privilege on the part of its officers. *Ibid.*

#### ASSIGNEES.

(For Actions by and against them.)

See ACTION.

*A.* deposits deeds with *B.* by way of equitable mortgage, and *C.* becomes his surety for the payment of any balance due. Separate fiats issue against *A.* and *C.*; and, under the fiat against *C.*, *B.* is appointed sole assignee. *B.*, as equitable mortgagee, petitions for the usual Order for the sale of the property. *Held*, that before such order could be made, some person must be chosen by *C.*'s creditors to protect their interests. *Ex parte Haines, re Barnett*, 4 Deac. 20; *S. C. Mont. & C.* 32.

Assignees, in instituting a suit in equity, proceed at the peril of costs, and the Court will not stay it, on the petition of creditors objecting to its being continued; but will refer it to the Commissioners, to inquire how

much of the assets ought to be retained by the assignees to abide the result of the suit. *Ex parte May, re Jones*, 4 Deac. 60. *S. C. Mont. & C.* 285.

#### (Liability of their Executors.)

The provisional assignee of the Insolvent Court, under st. 1 *Geo. 4. c.* 119. s. 7., assigned the estate of an insolvent to an assignee, who assented to such assignment, and acted under it as tenant of premises which the insolvent held as lessee for years. *Held*, that after the death of such last mentioned assignee, his executor was liable to the lessor, for breach of covenant in the lease subsequent to the testator's death; it not appearing that the Insolvent Court had appointed fresh assignees. *Abercrombie v. Hickman*, 8 Adol. & E. 683.

#### (What Property passes to them.)

A money bond, assigned by the obligee to creditors to secure a debt of larger amount, does not pass to assignees under a fiat against him, although the assignment is expressed to be "for further security," and contains a proviso to defeat it, on payment of the debt. *Dangerfield v. Thomas*, 9 Adol. & E. 292; *S. C. 1 Per. & D.* 287.

The pension payable to a military officer, on his retirement from the service of the East India Company, does not upon his bankruptcy pass to his assignees; such pension not being granted by deed, and consequently

not recoverable by an action at law. *Gibson v. East India Company*, 7 Scott, 74; S. C. 5 Bing. N. C. 262.

Property was settled on J. R. by his father, until he should take the benefit of the Insolvent Debtors' Act; and then the trustees were, during his life, to apply it in such manner and to such persons, for the board lodging and subsistence of J. R. and his family, as the trustees should think proper; and after his decease, upon trust for such persons as J. R. should appoint; and in default of appointment, in trust for his children. J. R. took the benefit of the Insolvent Debtors' Act. He had three children, but his wife was dead. *Held*, that his children, who were all infants, became entitled to three-fourths, and the assignees to one-fourth, of the life interest of J. R. *Rippon v. Norton*, 2 Beav. 63.

(When protected from Costs of Suit.)

The assignee of an insolvent mortgagor, before a bill was filed to foreclose the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors, and by his answer he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 9 Sim. 397.

The assignee under a fiat, which is annulled for fraud, cannot have his costs against the petitioning creditor.

*Es parte Caldecott, re Heath*, 4 Deac. 264.

(Stock invested in fictitious Name.)

Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the Court of Exchequer, on a bill filed by the assignees against the Bank of England, ordered the Bank to erase from their books the fictitious name, and insert that of the bankrupt. *Green v. Bank of England*, 3 Younge & C. 722.

#### ASSIGNMENT OF DEBT.

*See* DEBT.

#### ATTACHMENT.

*See* RELATION TO ACT OF BANKRUPTCY.

#### ATTORNEY.

*See* SOLICITOR.

#### AUCTIONEER.

In an action of trover by the assignees against an auctioneer who sold the bankrupt's property, the auctioneer should be allowed any sum that he has paid for rent, and also a reasonable sum for the expenses of the sale, but not any part of the expense of removing the goods from the premises. *Grimshaw v. Atterwell*, 8 Car. & P. 6.

#### BANKRUPT.

(Actions and Suits by and against.)

In an action by a bankrupt for



money had and received, it is a good plea (under stat. 6 *Geo.* 4. c. 16. s. 127), that the plaintiff became bankrupt, and obtained his certificate in 1822; that a second commission issued against him May 20th 1825, under which his effects were assigned in July 1825, and he obtained his certificate in 1826, but did not pay 15s. in the pound; whereby and by force of the statute, the debt demanded in the declaration hath vested in the assignees. *Young v. Rishworth*, 8 Adol. & E. 470.

The stat. 4 *Geo.* 4. c. 16. s. 127. (Sept. 1, 1825), operates in such a case retrospectively. *Ibid.*

Where the estate of a bankrupt, after certificate, hath vested in the assignees, he cannot sue for an after-accruing debt, though the assignees do not interpose. *Ibid.*

Debt on bond. Plea, bankruptcy of plaintiff; concluding, that, "by reason of the premises, the assignees became entitled to the debt and cause of action." *Held*, that the latter allegation was not traversable. *Dangerfield v. Thomas*, 9 Adol. & E. 292; S. C. 1 Per. & D. 287.

The replication stated, that plaintiff had by indenture before his bankruptcy assigned the bond to G. and E., as a security for a larger debt, and that the action was prosecuted for their benefit. *Held*, that no *profert* of the indenture was necessary. *Ibid.*

Where a defendant (after plea) pleaded his bankruptcy and certificate *puis darrein continuance*, and

plaintiff thereupon took out a summons for leave to discontinue, without costs, it was held that he was entitled so to do, and that defendant could not be allowed to sign judgment of *non-pros.* for want of a replication. Stat. 6 *Geo.* 4. c. 16. s. 59. is not applicable, where a certificate in bankruptcy is pleaded *puis darrein continuance*. *Wollen v. Smith*, 9 Adol. & E. 505; S. C. 1 Per. & D. 374.

To assumpsit for goods sold, the defendant pleaded, that after the debt was contracted, he became a bankrupt, and that a fiat was issued against him on the petition of the plaintiff; that before the defendant was adjudged a bankrupt under the fiat, an agreement was made between them, under which the plaintiff abandoned all proceedings, in consideration of the defendant giving him a bill of exchange as a security for part of his debt. *Held*, on special demurrer, that the plea did not show the debt to be forfeited within 6 *Geo.* 4. c. 16. s. 8., as there was no averment that the plaintiff had, or could have received, by the agreement more than the other creditors, or that the defendant had not assets to pay all his creditors their demands in full, or that the fiat had been proceeded with. *Davis v. Holding*, 3 Per. & D. 413.

The bankruptcy of a sole plaintiff, after the cause of action accrued and before the commencement of the suit, is an issuable plea. *Willis v. Allen*, 7 Scott, 474.

*(Suit commenced before Bankruptcy.)*

Plaintiff filed a bill and obtained an injunction to restrain the defendant from proceeding against her at law. Afterwards the plaintiff became bankrupt, and the defendant served her assignees with notice of a motion that they might file a supplemental bill within a certain time, or that the bill might be dismissed. No supplemental bill was filed, but the assignees consented to an order of dismissal. The plaintiff was not served with notice of the motion to dismiss; and on that account the order was discharged. *Vestris v. Hooper*, 4 Sim. 570.

*(Admissibility as a Witness.)*

*A.* and *B.* were co-partners. *A.* retired, and *B.* took *C.* into partnership with him. That partnership was dissolved, and then *B.* became bankrupt. *Held*, that *B.* was not a good witness to prove an agreement, alleged by *A.* to have been made with him by *B.* and *C.*, to indemnify him against the debts of the first partnership. *Warren v. Taylor*, 8 Sim. 599.

The defendant, who had put in his answer, but became bankrupt before the hearing of the cause, was examined as a witness for the co-defendant. *Whitbread v. Jordan*, 1 Y. & C. 303.

*(Necessity of other Parties joining in Suit.)*

*A.* demised to *B.* (who was alleged

to be an uncertificated bankrupt) a wharf, with the use of a road in common with the occupiers of adjoining wharfs. *C.* obstructed the road. *B.* filed a bill against him to restrain the nuisance. *Held*, that neither *A.*, nor the occupiers of the adjoining wharfs, nor the assignees of *B.*, were necessarily parties to the bill. *Semple v. London and Birmingham Railway Company*, 9 Sim. 209.

*(Suing Assignees.)*

In general, an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. *Tarleton v. Hornby*, 1 Younge & C. 172.

Where one of the assignees demurred to such a bill for want of equity, and the demurrer was allowed: *Held*, that the other assignees might plead this matter in bar of the suit. *Ibid.* 333.

## BILLS AND NOTES.

*A.*, through the agency of *B.*, consigns goods to *C.* in India, for sale, who remits bills to *B.*, directing him to pay them over to *A.*, "being remittance to account against *A.*'s consignment of the goods;" and *C.* also writes to *A.*, advising him of the re-

mittance thus made in his favour to *B.* Before the bills reached *B.*'s hands, he became bankrupt, at which time *C.* was indebted to him in a large amount. *Held*, that *B.*'s assignees were bound to deliver up the bills to *A.*, and that they could not apply them towards the payment of the debt due from *C.* to *B.* *Ex parte Hankey, re Douglas*, 4 Deac. 1; *S. C. Mont. & C. 1.*

*A.* accepted four bills for the accommodation of *B.*, which *B.* indorsed and deposited with his bankers, to secure any floating balance. *B.* became bankrupt, when the bankers proved for a balance greatly exceeding the amount of the bills, excepting in their proof these bills, with others, as securities; and they afterwards received a dividend of 2s. in the pound on the amount of their proof. The bills were subsequently paid in full by *A.* *Held*, that *A.* had a right to call on the bankers to refund the amount of the dividend of 2s. on the amount of the bills. *Ex parte Holmes, re Garner*, 4 Deac. 82; *S. C. Mont. & C. 301.* Reversing *Ex parte Holmes*, 3 Deac. 662.

Where the petitioning creditor's debt was on a bill of exchange, which was not in his hands when the fiat was sued out, the debt of another creditor was substituted at the costs of the petitioning creditor. *Ex parte Cattley, re Goodwin*, 4 Deac. 138; *S. C. Mont. & C. 360.*

The petitioner lent the bankrupt 1600*l.* on his promissory note, paya-

ble three months after date, renewable for the same period at the option of the bankrupt; but so as not to exceed the period of eighteen months in the whole, the bankrupt undertaking to pay 7½ per cent. interest, and 3*l.* per cent. insurance. The note was renewed four times successively, and on each renewal the same rate was deducted for interest and insurance. *Held*, that this transaction was protected by the 3 & 4 *Will. 4. c. 98. s. 7.*, which allows any interest to be taken on a bill or note not having more than three months to run; and was consequently not usurious. *Ex parte Terrewest, re Poynter*, 4 Deac. 144; *S. C. Mont. & C. 146, 351.* Reversing the decision of the Court of Review, 3 Deac. 590.

*(When may be set off.)*

To an action by assignees of a bankrupt for the price of a phaeton, for which defendant had agreed to pay ready money, defendant pleaded a set-off in respect of a bill of exchange drawn by *H.*, accepted by the bankrupt, and indorsed by *H.* to defendant. Plaintiffs replied, that, after the bill was dishonoured, *H.* indorsed it to defendant, without consideration, in trust that defendant should purchase the phaeton of the bankrupt, hand it over to *H.*, and fraudulently attempt to set off the bill against the price of the phaeton. *Held*, a sufficient answer to the claim of set-off. *Lackington v. Combes*, 6 Bing. N. C. 71; *S. C. 8 Scott, 312.*

**BROKER.**

Where the bankrupt had been employed as a broker by the petitioners to sell a parcel of goods, and secretly agreed with the buyer to share the profit or loss of the transaction in lieu of brokerage, and part of the goods remained in the bankrupt's hands at the time of his bankruptcy; *Held*, that the transaction was fraudulent, as against the petitioners, and the sale void; and that the assignees were bound to deliver up to the petitioners the remaining portion of the goods. *Ex parte Heath, re Pemberton*, 4 Deac. 294; *S. C. Mont. & C. 667*.

**CERTIFICATE.**

*And see* ELECTION.

The date of a certificate, if written on an erasure, ought to be explained by affidavit. *Ex parte Brown, re Brown*, 4 Deac. 164; *S. C. Mont. & C. 361*.

(*Petition to stay.*)

In a petition to prove, and stay the certificate, it is a necessary allegation, that the amount of the debt sought to be proved will turn the certificate. *Ex parte Snape, re Ransford*, 4 Deac. 164; *S. C. Mont. & C. 607*.

(*Allowance of.*)

Where one of two bankrupts under a joint fiat dies, without having made an affidavit of his conformity, and the surviving bankrupt applies for the allowance of the joint certificate, the Order can only be made for its allowance as to the surviving bankrupt,

reserving for further consideration the question as to the allowance to the deceased bankrupt. *Ex parte Walsley, re Ogden*, 4 Deac. 240.

(*Pleading it.*)

Where a defendant (after plea) pleaded his bankruptcy and certificate *puis darrein continuance*, and plaintiff thereupon took out a summons for leave to discontinue without costs, it was held that he was not entitled to do so, and that defendant could not be allowed to sign judgment of *non pros* for want of a replication. Stat. 6 Geo. 4. c. 16. s. 59. is not applicable, where a certificate in bankruptcy is pleaded *puis darrein continuance*. *Wollen v. Smith*, 9 Adol. & E. 505; *S. C. 1 Per. & D. 374*.

(*Under a Second Commission.*)

The 6 Geo. 4. c. 16. s. 127., which enacts that if any person, who shall have been discharged by such certificate as aforesaid, shall become bankrupt, and have obtained or shall hereafter obtain such certificate, unless his estate shall pay 15s. in the pound, his future estate shall vest in the assignees under the second commission, does not apply, where the second certificate was obtained before the act. Therefore, where *A.* had obtained his certificate under a second bankruptcy, before the 6 Geo. 4. c. 16., it was held a valid defence to an action of trover brought by the assignee under the second commission against the official assignee under a

subsequent fiat, that the goods were in the disposition of *A.* at the time he became a bankrupt under the fiat, as reputed owner, whereupon the defendant, as such official assignee, took and converted the same for the benefit of *A.*'s creditors, notwithstanding *A.* had not paid 15*s.* in the pound under the second commission. *Benjamin v. Belcher*, 3 Per. & D. 317; *S. C.* 11 Adol. & E. 250.

### COMMISSIONERS.

*Semble*, the Commissioners have a discretionary power, in requiring or dispensing with the personal attendance of a creditor in all matters of proof; and this Court will not interfere on the subject. *Ex parte Shaw, re Kirkby*, 4 Deac. 190; *S. C.* Mont. & C. 624.

Where the Commissioners in a country fiat decline to act, the Court will either order a new fiat to issue to another list, or the present fiat to be amended, by inserting the names of other Commissioners, at the option of the petitioning creditor. *Ex parte Castle, re Todd*, 4 Deac. 273; *S. C.* Mont. & C. 654.

### COMMITMENT.

A party committed by the Commissioners, until he shall submit himself as a witness, cannot, at any time when he chooses to submit, call upon them to sit for the purpose of taking his examination, without paying the costs of their sitting. *Re Stockwin*, 6 Nev. & M. 813.

### COMPOSITION CONTRACT.

The Court declined to act on a certificate of Commissioners, made eleven years ago, without first sending it back to them for review. *Ex parte Marindin, re Marindin*, 4 Deac. 57; *S. C.* Mont. & C. 282.

Where the bankrupt applies to supersede an old commission, on compounding with his creditors for the residue of their debts, and the assignees are dead,—there must be a new choice of assignees, and the bankrupt must proceed under the composition contract clauses of 6 Geo. 4. c. 16. ss. 133. 134. *Ex parte Monk, re Monk*, 4 Deac. 262; *S. C.* Mont. & C. 637.

### COMPOSITION.

Where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take the defendant's bills at long dates, for their respective debts, stipulated for a bill of exchange, to be indorsed to him for a further sum, the whole agreement was held void, as being a fraud upon the other creditors; and it was also held, that the plaintiff could not recover upon the defendant's bills, for the amount of the composition money, even although he had received nothing on the bill indorsed to him by the defendant. *Howden v. Haigh*, 3 Per. & D. 661.

Upon a composition between a debtor and his creditors, a creditor cannot ostensibly accept a composition, and sign the deed which ex-

presses his acceptance of the terms, and at the same time stipulate for, or secure to himself, a peculiar and separate advantage, which is not expressed upon the deed. *Cullingworth v. Loyd*, 2 Beav. 385.

A creditor, holding a security for his debt, may stipulate to have the benefit of it, in addition to the amount of the composition offered by a debtor to his creditors; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them. *Ibid.*

A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them, or any agreement entered into by them generally. One of the creditors stipulated that he should have the benefit of a mortgage security which he held, in addition to the amount of composition. He accepted the composition, but did not then execute the composition deed; but he afterwards realized his mortgage security, and then executed the composition deed, by which he purported to release his debtor altogether, without any reservation of the mortgage security. Another creditor subsequently executed the composition deed. The agreement was not communicated to the other creditors, but there was no fraudulent concealment. *Held*, on grounds of public policy, that the creditor was not entitled to retain his

mortgage security, in addition to the amount of the composition. *Ibid.*

One *D.* proposed to make a composition with his creditors, paying them 8*s.* in the pound on their respective debts, they releasing him from all claims and demands in respect of such debts, and agreeing to give up all securities held by them. Certain creditors of *D.* refused to sign the deed, unless the defendants signed it. The defendants at first refused to do so, but afterwards consented, on *D.* assigning to them, as a security for the residue of their debt, a policy of assurance for 200*l.* on the life of his mother, which he had previously placed in their hands. *Held*, that the assignees of *D.*, against whom a fiat afterwards issued, might recover from the defendants in an action for money had and received, the money obtained by them from the insurance office, on the falling of the life; the assignment of the policy being a fraud on the rest of the creditors, although the 8*s.* in the pound was not entirely paid. *Alsager v. Spalding*, 6 Scott, 204.

## COMPUTATION OF TIME.

*See* TIME.

## CONCERT.

*And see* ANNULLING FIAT.

Although it is no objection now to a fiat, that it is merely concerted with the petitioning creditor, yet if it is fraudulently concerted, and the object is to serve the bankrupt's own pur-

poses, and not to benefit his creditors, as where there are no assets to divide, it will be annulled. *Ex parte Caldecott, re Heath*, 4 Deac. 264; *S. C. Mont. & C. 600.*

### CONSTRUCTION OF DEEDS, &c.

Two partners, to secure a partnership debt, conveyed certain joint property, particularly described in the deed, "and all other the hereditaments of them, or either of them, situate elsewhere in the town of Morpeth;" the recitals, covenants, and premises in the deed, relating solely to the joint property. *Held*, that the operation of the deed extended to a separate estate of one of the partners in the town of Morpeth. *Ex parte Young, re Gowen*, 4 Deac. 185; *S. C. Mont. & C. 599.*

Where a legacy was given by a will, subject to a clause of forfeiture, in case the legatee "should mortgage, charge, sell or expose to sale, assign, or encumber the same." *Held*, that it was not forfeited by the bankruptcy of the legatee. *Whitfield v. Prickett*, 2 Keen, 608.

### CONSTRUCTION OF STA- TUTES.

*See* STATUTES.

### CONTINGENT DEBT.

Where *A.* purchased of *B.* his business of an attorney, the purchase money to be paid by two instalments; and the conveyance contained a pro-

viso, giving *A.* the power, within a limited time, either of completing the purchase, or giving *B.* notice of his abandonment of the contract, in which case *B.* was to repay 50*l.* of the purchase money: *Held*, that *B.*'s discharge under the Insolvent Debtors' Act, before the expiration of the time limited for giving such notice, was no answer to an action to recover back the 50*l.*, after such notice given; for that it was not a contingency capable of valuation at the time of the insolvency. *Brown v. Fleetwood*, 5 Mee. & W. 19.

### CONTRACT.

*See* EXECUTION—RELATION TO ACT  
OF BANKRUPTCY.

(*When Illegal.*)

*See* ILLEGALITY.

### COSTS.

(*Taxation of.*)

*See* TAXATION.

Where parties agree upon an order out of Court, any question of costs between them cannot be decided, without opening the whole case. On a petition for the sale of an equitable mortgage, which is rendered necessary by the assignees, from a mistaken view of their rights, they are only entitled to costs out of the bankrupt's general estate. *Ex parte Bate, re Gough*, 4 Deac. 46; *S. C. Mont. & C. 58.*

Where certain creditors had succeeded in expunging various proofs, which had been improperly made un-

der the fiat, the Court referred it to the Commissioners, to allow them such costs as they should think reasonable. *Ex parte Margerison, re Haworth*, 4 Deac. 80.

(*Security for.*)

The defendant, on the eve of trial at the assizes, March 1836, obtained leave to add a plea. Plaintiff thereupon countermanded notice of trial, and demurred to the plea; and the demurrer was set down for argument May 1836. Plaintiff, in October 1836, became insolvent, and in December obtained his discharge. In the beginning of Michaelmas Term 1837, (the demurrer then standing near the head of the special paper,) defendant moved that plaintiff might give security for costs: *Held*, too late. *Young v. Rishworth*, 8 Adol. & E. 479 (*note*).

Where a plaintiff, who under circumstances had been ordered to give security for costs, by reason of his insolvency, failed to comply with the Order, he was ordered to give that security within ten days, or his bill to be dismissed. *Tredwell v. Byrch*, 1 Younge & C. 476.

The assignee, under a fiat which is annulled for fraud, cannot have his costs against the petitioning creditor. *Ex parte Caldecott, re Heath*, 4 Deac. 264.

(*On a Bill against Assignee to foreclose.*)

The assignee of an insolvent mortgagor, before a bill was filed to fore-

close the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors, and by his answer he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 9 Sim. 397.

CREDITOR.

(*Opposing Adjudication.*)

The Court will not permit a creditor to attend by himself, or his counsel, before the Commissioners at the opening of the fiat, for the purpose of opposing the adjudication; although he swears that he believes the party is not a trader, and that the fiat is issued for an improper purpose. *Ex parte Cooke, re Scholes*, 4 Deac. 78.

(*Competency as a Witness.*)

A creditor, who has sold his debt, is a competent witness in support of the fiat. *Pulling v. Meredith*, 8 Car. & P. 763.

In a suit by the assignee under the Insolvent Debtors' Act to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff, and he is not rendered competent by the 3 & 4 Will. 4. c. 42. ss. 26. 27. *Holden v. Hearn*, 1 Beav. 445.

(*What Proceedings by, amount to an Election.*)

See ELECTION OF CREDITOR.



## DAMAGES.

See PROOF.

## DATE.

The date of a certificate, if written on an erasure, ought to be explained by affidavit. *Ex parte Brown, re Brown*, 4 Deac. 164; *S. C. Mont. & C.* 361.

## DEBT.

And see PETITIONING CREDITOR.

(Assignment of.)

Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Mylne & C. 129.

## DEED.

(What fraudulent.)

See VOLUNTARY CONVEYANCE.

(What a good Delivery of.)

See MORTGAGE.

## DEPOSITIONS.

(When Evidence.)

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat; *Held*, that the deposition then made was evidence of the act of bankruptcy, as against such creditor, in an action

against him by the assignees, in which the act of bankruptcy was put in issue. *Gardner v. Moul*, 10 Adol. & E. 464; *S. C. 2 Per. & D.* 403.

## DIVIDENDS.

Where, after a proof of a debt, a surety pays part of it to the creditor, but not in discharge of the whole debt, the creditor may receive dividends on the full amount of his proof. *Ex parte Coplestone, re Snell*, 4 Deac. 54; *S. C. Mont. & C.* 264.

*A.* accepted four bills for the accommodation of *B.*, which *B.* indorsed and deposited with his bankers, to secure any floating balance. *B.* became bankrupt, when the bankers proved for a balance greatly exceeding the amount of the bills, excepting in their proof these bills, with others, as securities; and they afterwards received a dividend of 2s. in the pound, on the amount of their proof. The bills were subsequently paid in full by *A.* *Held*, that *A.* had a right to call on the bankers to refund the amount of the dividend of 2s. on the amount of the bills. *Ex parte Holmes*, 4 Deac. 82; *S. C. Mont. & C.* 301. Reversing *Ex parte Holmes*, 3 Deac. 662.

## ELECTION OF CREDITOR.

The creditors of *A.* having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that *A.* was only the

agent of *B. & Co.*, proceeded nevertheless to sign *A.*'s certificate. *Held*, that this was not an election by the creditors to treat *A.* as their sole debtor. *Taylor v. Sheppard*, 1 *Younge & C.* 271.

(*As to Proof.*)

Where, under a bankruptcy, parties have proved their debts on the footing of holding no security, they will not generally be permitted to withdraw their proof, and set up a security; but ignorance of the existence of a security may be ground for granting relief to a party who has so proved. *Grugeon v. Gerrard*, 4 *Younge & C.* 119.

#### EQUITABLE MORTGAGE.

*And see LIEN.*

*A.* deposits deeds with *B.*, by way of equitable mortgage, and *C.* becomes his surety for the payment of any balance due. Separate fiats issue against *A.* and *C.*; and, under the fiat against *C.*, *B.* is appointed sole assignee. *B.*, as equitable mortgagee, petitions for the usual Order for the sale of the property. *Held*, that before such Order could be made, some person must be chosen by *C.*'s creditors to protect their interests. *Ex parte Haines, re Barnett*, 4 *Deac.* 20; *S. C. Mont. & C.* 32.

(*On Estate in Scotland.*)

The bankrupts deposited with a creditor the title-deeds of a real estate in Scotland, accompanied with a written agreement to secure the payment

of the general balance; both parties being resident in England, where the transaction itself took place. By the law of Scotland, no lien or equitable mortgage on real property is created by such a deposit. *Held*, nevertheless, that the contract, being made in England by contracting parties domiciled there, which was also the domicile of the assignees under the bankruptcy, the estate was charged with the equitable mortgage, and that the assignees were bound to pay to the creditor the amount of the proceeds of the sale of the estate. *Ex parte Pollard, re Courtney*, 4 *Deac.* 27; *S. C. Mont. & C.* 239, 253, 643. Reversing judgment in *Ex parte Pollard*, 2 *Deac.* 367.

(*Allowance of Costs.*)

On a petition for the sale of an equitable mortgage, which is rendered necessary by the assignees, from a mistaken view of their rights, they are only entitled to costs out of the bankrupt's general estate. *Ex parte Bate, re Gough*, 4 *Deac.* 46; *S. C. Mont. & C.* 58.

In equity an equitable mortgagee, though the mortgage be without a written memorandum, will be allowed his costs, as against the assignees of the insolvent mortgagor. *The Queen v. Chambers*, 4 *Younge & C.* 54.

(*Merger of.*)

Where there was a deposit of deeds, with an agreement to execute a legal mortgage, which was not exe-

cuted until after the party had committed an act of bankruptcy: *Held*, that, though the legal mortgage was avoided by the bankruptcy, the equitable mortgage was revived, and not merged in the legal mortgage. *Ex parte Harvey, re Emery*, 4 Deac. 52; *S. C. Mont. & C.* 261.

(*Validity of Deposit.*)

Where, on a petition of an equitable mortgagee for a sale, it was alleged, that the deed was deposited by a party "acting as the solicitor of the bankrupt;" this was held not a sufficient allegation of any actual authority given by the bankrupt to deposit the deed. *Ex parte Coleman, re Hood*, 4 Deac. 242.

(*Of Shares in Joint Stock Company.*)

*A.* and *B.* were directors in the West Middlesex Waterworks Company, in which no shareholder can act as a director, without holding ten shares. *A.* and *B.* being intimate friends, the latter advanced to the former several sums of money. The last of these advances was made on the 23d July 1829, on which day *A.* delivered to *B.* an order upon the secretary of the company to transfer *A.*'s ten shares into *B.*'s name. *B.* did not at that time make use of the order, and *A.* continued to act as director until his death in May 1832. *A.*'s affairs being insolvent, and a suit having been instituted for the administration of his assets, *B.* then served the order of transfer on the secretary,

and presented his petition in the suit, claiming an equitable lien on *A.*'s ten shares for the amount of his advances, with interest. *Held*, that these circumstances were not sufficient to show an intention to create a lien on the shares; and consequently *B.*'s claim was rejected. *Cumming v. Prescott*, 2 Younge & C. 488.

A mortgagee of shares in a company must give notice of his incumbrance to the secretary, or his lien will be lost, as against a subsequent purchaser for valuable consideration, without notice. *Ibid.*

(*What amounts to.*)

Where title-deeds are left in the hands of an attorney, for the purpose of preparing a mortgage, as a security for money previously advanced, this amounts to an equitable mortgage by deposit of title-deeds. *Keys v. Williams*, 3 Younge & C. 55.

(*Liability of Equitable Mortgagee for Contract of Mortgageor.*)

*A.* made an equitable mortgage of certain premises to *B.*, and he afterwards entered into an agreement to grant a lease of the premises to *C.*, who had notice of the prior charge. *A.* became bankrupt, before the lease was executed; and, on the petition of *B.*, an Order in bankruptcy was made, under which the premises were sold, and *B.* became the purchaser, and retained the amount of his equitable mortgage out of the purchase money. *Held*, on a bill filed by *C.*

for specific performance of the agreement, that *B.*, having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement. *Smith v. Phillips*, 1 Keen, 694.

#### ERASURE.

The date of a certificate written on an erasure ought to be explained by affidavit. *Ex parte Brown, re Brown*, 4 Deac. 164; *S. C. Mont. & C.* 361.

#### EVIDENCE.

*And see* WITNESS.

(*To explain written Documents.*)

In order to ascertain the terms on which a bond to secure advances is deposited with a creditor, the Court may have regard to external evidence, as well as the internal evidence of the bond itself. *Ex parte Fidgeon, re Fidgeon*, 4 Deac. 217.

(*Declaration of Party interested.*)

If *A.* is seeking to recover possession of a leasehold house in ejectment, and it appear that, after his term was granted to him, he became bankrupt, he cannot, in anticipation of a supposed defence that the defendant claims under his assignees, give in evidence declarations of the assignees, though they have an interest in the lease. *Doe dem. Colnaghi v. Bluck*, 8 Car. & P. 464.

(*In Trover by Assignees.*)

The protection given by the stat. 2 & 3 Vict. c. 29. s. 1. to contracts

with bankrupts and executions against their property, *bond fide* executed or levied before the date and issuing of the fiat, is not receivable in evidence in an action of trover by the assignee against an execution creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. *Byers v. Southwell*, 9 Car. & P. 320.

*Scemle* also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Ibid.*

(*Date of Document.*)

A written paper containing a statement of mutual accounts between a creditor and a bankrupt, by whom it was signed, and bearing date previous to the bankruptcy, showing a balance due to the creditor, is *prima facie* evidence, as against the assignees in an action brought by them against the creditor, that it was written at the time it bore date. *Sinclair v. Baggaley*, 4 Mees. & W. 813.

*Scemle*, that such a document is evidence of payment, and not of a set-off, and ought to be pleaded as such. *Ibid.*

(*In Trover against Assignees.*)

In an action of trover against assignees, the plea, that the plaintiff was not possessed, puts in issue the right of the plaintiff to the possession of the goods, as against the defend-

ants, at the time of the conversion; and therefore lets in evidence, that the goods, at the time of the bankruptcy, were within the order and disposition of the bankrupt as reputed owner (according to the 6 Geo. 4. c. 16. s. 73.), and that the defendants thereupon, as assignees, sold the goods. *Isaac v. Belcher*, 5 Mee. & W. 539.

*(Seal of Insolvent Court.)*

If a document be produced, under section 76 of the Insolvent Debtors' Act, 7 Geo. 4. c. 57., with a seal purporting to be the seal of the Insolvent Court, it is not necessary to prove that the seal is actually the seal of the Court. *Doe dem. Duncan v. Edwards*, 9 Adol. & E. 554; S. C. 1 Per. & D. 408.

*(Deposition of Agent.)*

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat; *Held*, that the deposition then made was evidence of the act of bankruptcy, as against such creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue. *Gardiner v. Moul*, 10 Adol. & E. 464; S. C. 2 Per. & D. 408.

*(To explain a judicial Document.)*

Where an Order is made by the Court of Review, under the 6 Geo. 4.

c. 16. s. 18., to cause a fiat in bankruptcy to be proceeded with, notwithstanding the petitioning creditor's debt has been found insufficient, the petition, on which the Order is made, cannot be used to explain any ambiguity in the Order. *Christie v. Unwin*, 3 Per. & D. 204.

*(As to reputed Ownership.)*

The plaintiff, at the recommendation of B., sent goods to a dyer, who was told by plaintiff's son that B. would give directions about them; B. called, and gave directions, and afterwards became bankrupt. In trover for these goods brought by plaintiff against B.'s assignees, *Held*, that the directions given by B. were admissible in evidence for the assignees. *Sharp v. Newsholme*, 5 Bing. N. C. 713; S. C. 8 Scott, 21.

*(As to fraudulent Preference.)*

The fact, that, after a fiat had been sued out, certain creditors of the bankrupt delivered up to the assignees goods which they had received from the bankrupt before the fiat, and before the delivery of certain goods by the bankrupt to defendant, *Held*, not admissible evidence against defendant in an action of trover brought against him by the assignees. *Bäckhouse v. Jones*, 6 Bing. N. C. 65; S. C. 8 Scott, 148.

*(Copy of Insolvent's Schedule.)*

Certified copies of the schedule, &c., may be given in evidence (under

the Insolvent Act) by other parties, besides the insolvent, or his creditors. *Price v. Asheton*, 1 Younge & C. 441.

#### ·EXCEPTING TO REPORTS.

A party cannot at the same time apply to confirm, and except to, the registrar's report; he must make his election, whether he applies to confirm, or except. *Ex parte Smythies, re Southall*, 4 Deac. 106; S. C. Mont. & C. 346, 656.

An exception to the registrar's certificate on an Order for taxation of costs, on the ground that he has not made a sufficient allowance in respect of certain items, must state how much he actually has allowed. *Ibid.* 4 Deac. 117; S. C. Mont. & C. 346, 651.

Where the registrar certifies, "that he had regard to the alleged agreement;" which agreement had been previously referred to in the petition and affidavits; this is a sufficient finding of the existence of such agreement. *Ibid.*

#### EXECUTIONS.

*And see* RELATION TO ACT OF BANKRUPTCY.

The protection given by the stat. 2 & 3 Vict. c. 29. s. 1. to contracts with bankrupts and executions against their property, *bond fide* executed or levied before the date and issuing of the fiat, is not receivable in evidence in an action of trover by the assignees against an execution creditor, either

under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. *Byers v. Southwell*, 9 Car. & P. 320.

An act of bankruptcy having been committed on the 6th July 1839, a *bond fide* execution was issued on the 8th, under which the goods of the bankrupt were levied. On the 19th July the 2 & 3 Vict. c. 29. was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees. *Held*, that the execution was protected by the statute. *Edmonds v. Lawley*, 6 Mee. & W. 285.

The stat. 2 & 3 Vict. c. 29. has a retrospective operation, so as to protect the sheriff from liability in respect of a *bond fide* execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the fiat issued, before the passing of the act, but the assignees were not appointed until afterwards. *Nelstrop v. Scarisbrick*, 6 Mee. & W. 684.

The delivering of a *fi. fa.* to the sheriff's deputy in London, is equivalent to delivery to the sheriff in the country. The goods of the debtor, therefore, are bound by such delivery to the deputy in London, and the execution creditor cannot be defeated by a vesting Order subsequently made by the Insolvent Court, under 1 & 2 Vict. c. 110. s. 37., although the provisional assignee seize

before the sheriff; for such vesting Order is not equivalent to sale in market overt, and passes such interest only as the insolvent himself had in the goods, and subject to his liabilities. *Woodland v. Fuller*, 3 Per. & D. 570.

Trover does not lie for the assignees of a bankrupt against a creditor, who sues out execution under a warrant of attorney not filed within twenty-one days, if the execution be completed before the act of bankruptcy. The remedy is by an action for money had and received, or by a special action on the stat. 3 Geo. 4. c. 39. *Brook v. Mitchell*, 6 Bing. N. C. 349.

#### EXPUNGING PROOF.

Where certain creditors had succeeded in expunging various proofs, which had been improperly made under the fiat, the Court referred it to the Commissioners to allow them such costs as they should think reasonable. *Ex parte Margerison, re Haworth*, 4 Deac. 80.

#### FIAT.

##### (Direction of.)

A London fiat will not be granted in preference to a Country one, merely because the act of bankruptcy is a fraudulent conveyance, and the petitioning creditor believes that fraud will be attempted to be practised in the country against the distant creditors. *Ex parte Meeking, re Bray*, 4 Deac. 51; S. C. Mont. & C. 71.

A London fiat was refused against a country trader, although not a seventh part in value of the creditors resided where he carried on his business, and all the witnesses to prove the requisites lived in London, and the object of the fiat was to defeat an alleged fraudulent cognovit. *Ex parte Wainwright, re Mansfield*, 4 Deac. 56.

Where the object of a fiat was to set aside a fraudulent preference to a creditor in London, and all the witnesses to prove that fact and the requisites of the fiat resided there, the fiat was directed to London in preference to Southampton. *Re James*, 4 Deac. 81; S. C. Mont. & C. 165.

Order made to change the direction of the fiat, under very special circumstances. *Re Graham*, 4 Deac. 212; S. C. Mont. & C. 639.

Venue refused to be changed to London, although creditors to the amount of 18,000*l.* resided there, and only one of importance in the place to which the fiat was directed. *Ex parte Knowles*, 4 Deac. 213.

##### (Suing out.)

The date of a fiat is *prima facie* evidence of the time of its being issued, within the meaning of the 6th section of the 6 Geo. 4. c. 16. *Semble*, that the term "sued out" contained in that section, may be fairly held to mean "applied for." *Ex parte Rowe, re Rowe*, 4 Deac. 68; S. C. Mont. & C. 149, 334.

*(Amendment of.)*

A fiat cannot be amended, after it has been issued; the mistake can only be rectified by issuing a fresh fiat. *Ex parte Rhands, re Morris*, 4 Deac. 124; *S. C. Mont. & C.* 348.

*(Impounding.)*

Special Order made to impound a separate fiat, in favour of a subsequent joint fiat. *Ex parte Ravenscroft, re Beesley*, 4 Deac. 172.

*(Second and Third Fiat.)*

To an action for money had and received, it is a good plea (under stat. 6 Geo. 4. c. 16. s. 127.) that plaintiff became bankrupt and obtained his certificate in 1822; that a second commission issued against him May 20th, 1823, under which his effects were assigned in July 1823, and he obtained his certificate in 1826, but did not pay 15s. in the pound; whereby, and by force of the statute, the debt demanded in the declaration hath vested in the assignees. *Young v. Rishworth*, 3 Adol. & E. 470.

The 6 Geo. 4. c. 16. s. 127., which came into operation September 1 1825, operates in such a case retrospectively. *Ibid.*

Where the estate of a bankrupt, after certificate, is thus vested in the assignees, he cannot sue for an after accruing debt, though the assignees do not interpose. *Ibid.*

The 6 Geo. 4. c. 16. s. 127., which enacts that "if any person, who shall

have been discharged by such certificate as aforesaid, shall become bankrupt, and have obtained or shall hereafter obtain such certificate, unless his estate shall pay 15s. in the pound, his future estate shall vest in the assignees under the second commission," does not apply, where the second certificate was obtained before the act. Therefore, where *A.* had obtained his certificate under a second bankruptcy before 6 Geo. 4. c. 16., it was held a valid defence to an action of trover, brought by the assignee under the second commission against the official assignee under a subsequent fiat, that the goods were in the disposition of *A.*, at the time he became a bankrupt under the fiat, as reputed owner, whereupon the defendant, as such official assignee, took and converted the same for the benefit of *A.*'s creditors; notwithstanding *A.* had not paid 15s. in the pound under the second commission. *Benjamin v. Belcher*, 3 Per. & D. 317; *S. C.* 11 Adol. & E. 250.

*Quære*, whether, where the act does apply, a third commission is void. *Ibid.*

*(Opening.)*

An order was made, *nunc pro tunc*, for dispensing with the petitioning creditor's attendance at the opening of the fiat. *Ex parte Whibley, re Atkinson*, 4 Deac. 263; *S. C. Mont. & C.* 642.

The Court will not extend the time for opening a fiat, by reason of nego-



cations pending for a compromise between the bankrupt and his creditors. *Ex parte Castle, re Todd*, 4 Deac. 276; *S. C. Mont. & C.* 654.

### FIERI FACIAS.

*See* EXECUTION.

### FIXTURES.

Where a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards became bankrupt: *Held*, that the mortgagee might declare in case, as reversioner, against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage, although there was a covenant in the original lease to the mortgagor, to yield up to the lessor at the determination of the term "all fixtures and things to the premises belonging or to belong." *Hitchman v. Walton*, 4 Mee. & W. 409.

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises, under a right still to consider himself as tenant. Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and

the lessor entered upon the assignees in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee (still continuing in possession) removed and sold a fixture put up by the lessee for the purposes of trade, and the jury found that it was not removed within a reasonable time after the entry of the lessor: *Held*, that they had no right so to remove it, and that the lessor might recover it in trover. And *semble*, such would have been the case, even without such finding of the jury. *Weeton v. Woodcock*, 7 Mees. & W. 14.

### FORFEITURE.

Where a legacy was given, subject to a clause of forfeiture, in case the legatee "should mortgage, charge, sell, or expose to sale, assign, or encumber the same;" *Held*, that it was not forfeited by the bankruptcy of the legatee. *Whitfield v. Prickett*, 2 Keen, 608.

(*Of Debt.*)

*See* PETITIONING CREDITOR.

### FRAUD.

*See* STOCK.

### FRAUDULENT DEED.

*See* VOLUNTARY CONVEYANCE.

### FRAUDULENT PREFERENCE.

*And see* RELATION TO ACT OF BANKRUPTCY.

Where a person in insolvent circumstances, being pressed by particular creditors, employed an attorney

to endeavour to effect an arrangement with all his creditors ; but, that failing, the attorney advised that his goods should be sold by auction, and that he should go through the Insolvent Debtors' Court, in order that his effects might be rateably divided amongst his creditors ; and the goods were sold accordingly, and the proceeds were, with the insolvent's assent, paid over by the auctioneer to the attorney, who (after making several payments to and on account of the insolvent) retained against the assignees the whole amount of his bill for the business done for the insolvent: *Held*, that this was not a voluntary transfer or delivery of that sum by the insolvent to the attorney, within the 7 *Geo. 4. c. 57. s. 32.*; there being no proof that it was intended that he should hold the proceeds for his own benefit, or for the benefit of any particular creditors, or otherwise than as the agent of the insolvent. *Wainwright v. Clement*, 4 *Mec. & W.* 385.

One *D.* proposed to make a composition with his creditors, paying them 8*s.* in the pound on their respective debts, they releasing him from all claims and demands in respect of such debts, and engaging to give up all securities held by them. Certain creditors of *D.* refused to sign the deed, unless the defendants signed it. The defendants at first refused to do so, but afterwards consented, on *D.* assigning to them as a security for the residue of their debt

a policy of insurance for 200*l.* on the life of his mother, which he had previously placed in their hands. *Held*, that the assignees of *D.*, against whom a fiat afterwards issued, might recover from the defendants, in an action for money had and received, the money obtained by them from the insurance office on the falling of the life ; the assignment of the policy being a fraud on the rest of the creditors, although the 8*s.* in the pound was not entirely paid. *Alsager v. Spalding*, 6 *Scott*, 204.

Upon a composition between a debtor and his creditors, a creditor cannot ostensibly accept a composition, and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage, which is not expressed upon the deed. *Cullingworth v. Loyd*, 2 *Beav.* 385.

A creditor, holding a security for his debt, may stipulate to have the benefit of it, in addition to the amount of the composition offered by a debtor to his creditors ; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them *Ibid.*

A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them, or any agreement entered into by them generally. One of the creditors stipulated, that he should have the benefit

of a mortgage security which he held, in addition to the amount of composition. He accepted the composition, but did not then execute the composition deed; but he afterwards realized his mortgage security, and then executed the composition deed, by which he purported to release his debtor, altogether, without any reservation of the mortgage security. Another creditor subsequently executed the composition deed. The agreement was not communicated to the other creditor, but there was no fraudulent concealment. *Held*, on grounds of public policy, that the creditor was not entitled to retain his mortgage security, in addition to the amount of the composition. *Cullingworth v. Loyd*, 2 Beav. 385.

#### FRAUDULENT SALE.

Goods were sold by defendant, as agent of *C.*, in contemplation of *C.*'s bankruptcy, for the purpose of raising money for defendant and *C.*; the buyer did not know the sale to be fraudulent: *Held*, that such sale was not an act of bankruptcy by *C.* *Harwood v. Bartlett*, 6 Bing. N. C. 61; *S. C.* 8 Scott, 171.

#### FREIGHT.

*A.*, on behalf of the owners of a ship, entered into a charterparty with *B.*, by which *B.* agreed to pay to *A.*, on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charterparty to *C.*, as a se-

curity for a debt, and *C.* gave notice of the assignment to *A.*, but not to *B.* The owner having subsequently become bankrupt, it was held, that the arrears of freight were not in his order and disposition at the time of his bankruptcy. *Gardner v. Lachlan*, 4 Mylne & C. 129.

#### GUARANTEE.

See SURETY.

#### ILLEGALITY.

And see FRAUDULENT PREFERENCE.

Defendant, subject to the approval of a meeting of creditors, agreed to pay plaintiffs, assignees of *B.* a bankrupt, 2012*l.*, supposed to be equal to 10*s.* in the pound upon all debts then proved; the fiat was to be worked in the usual way; a claim of defendant's of 700*l.* was to be allowed in full; the assignees to pay the costs of the bankruptcy; the surplus of the estate to be divided among the creditors, but the dividends of those who had previously received 10*s.* in the pound to be paid over to defendant, and the excess beyond 10*s.* in the pound to belong to the creditors: *Held*, that this agreement was void, as contrary to the policy of the bankrupt law. *Staines v. Wainwright*, 6 Bing. N. C. 174; *S. C.* 8 Scott, 280.

#### INJUNCTION.

(To prevent the issuing of a Fiat.)

Partners being indebted to their bankers, it was agreed between them

that one should retire; that the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the retiring partner from his liability. The bankers signed a memorandum according to the agreement; and, having afterwards attempted to make the retiring partner a bankrupt, by proceeding under the 8th section of the 1 & 2 Vict. c. 110. (the Act for the Abolition of Imprisonment for Debt) they were restrained from so doing by injunction. *Atwood v. Banks*, 2 Beav. 192.

#### INROLMENT OF PROCEEDINGS.

Although a fiat is annulled, the bankrupt has a right to have it enrolled of record, for the purposes of an action; and where the petitioning creditor refused to produce it for enrolment, the Court ordered it to be enrolled, and the petitioning creditor to pay the costs of the application. *Ex parte May, re May*, 4 Dea. 174; S. C. Mont. & C. 619.

#### INSOLVENT.

(*Validity of new Security given by.*)

Where an insolvent debtor was remanded for six months at the suit of G., and during his imprisonment A., the attorney of G., agreed with him that he should be discharged on giving A. a bill of exchange for a part of G.'s debt, and an I. O. U. for A.'s

bill of costs in the action; which he gave, and was liberated accordingly: *Held*, that the insolvent could not be sued, either on the bill of exchange, or on the I. O. U. *Ashley v. Killick*, 5 Mees. & W. 509.

Where an insolvent, being arrested after his discharge for a new debt, agreed, on A.'s becoming his bail, to give him a bond for 300*l.*, in which amount was included a debt of 80*l.*, which had been inserted in the insolvent's schedule: *Held*, that the insolvent was not entitled to be discharged out of custody, having been taken in execution in an action by A. upon the bond, in which he had suffered judgment to go by default. *Denne v. Knott*, 7 Mees. & W. 143.

(*Contingent Debt.*)

Where A. purchased of B. his business of an attorney, the purchase-money to be paid by two instalments; and the conveyance contained a proviso giving A. the power within a limited time, either of completing the purchase, or giving B. notice of his abandonment of the contract, in which case B. was to repay 50*l.* of the purchase money: *Held*, that B.'s discharge under the Insolvent Debtors' Act, before the expiration of the time limited for giving such notice, was no answer to an action to recover back the 50*l.* after such notice given; for that it was not a contingency capable of valuation, at the time of the insolvency. *Brown v. Fleetwood*, 5 Mees. & W. 19.

*(Lodging Detainer against.)*

By the 85th section of the 1 & 2 Vict. c. 110. the case of a remanded insolvent is taken entirely out of the operation of the act; and therefore a writ of detainer may be lodged against him as heretofore, and no writ of summons need be sued out, nor any application made to a judge under the 3d section. *Turner v. Darnell*, 5 Mees. & W. 28.

*(Voluntary Assignment by.)*

*B.*, being in insolvent circumstances, and having several executions in his house, to satisfy which all his goods must have been sold, at the suggestion of one of the execution creditors, assigned to him all his effects, in trust for the general benefit of his creditors who should come in and sign the deed. The deed recited, that *B.* had "proposed" to execute such assignment. The assignee paid the sheriff's officer the amount of the executions, and he withdrew from possession. Several of the execution creditors signed the deed. Within three months after the assignment, *B.* went to prison, and subsequently was discharged under the Insolvent Act. *Held*, that the assignment was not voluntary, within the meaning of the 7 Geo. 4. c. 57. s. 32. *Knight v. Fergusson*, 5 Mees. & W. 389.

*(Voluntary transfer by.)*

Where a person in insolvent circumstances, being pressed by particular creditors, employed an attorney

to endeavour to effect an arrangement with all his creditors; but, that failing, the attorney advised that his goods should be sold by auction, and that he should go through the Insolvent Debtors' Court, in order that his effects might be rateably divided amongst his creditors; and the goods were sold accordingly, and the proceeds were, with the insolvent's assent, paid over by the auctioneer to the attorney, who (after making several payments to and on account of the insolvent) retained against the assignees the whole amount of his bill for the business done for the insolvent: *Held*, that this was not a voluntary transfer or delivery of that sum by the insolvent to the attorney, within the 7 Geo. 4. c. 57. s. 32., there being no proof that it was intended that he should hold the proceeds for his own benefit, or for the benefit of any particular creditors, or otherwise than as the agent of the insolvent. *Wainwright v. Clement*, 4 Mees. & W. 385.

*(Discharge as to Outlawry.)*

The defendant having been outlawed in a cause after judgment, and having been discharged from the debt by the Insolvent Debtors' Court, while in custody under the outlawry; the Court of Common Pleas refused to charge him in custody on the judgment in outlawry. *Adcock v. Fiske*, 6 Bing. N. C. 17; S. C. 8 Scott, 138.

By stat. 7 Geo. 4. c. 57. ss. 10, 50., the Insolvent Debtors' Court has power to discharge a party from custody, under a *capias utlagatum* upon a judgment for damages and costs. *Hamlin v. Crossley*, 8 Adol. & E. 677.

(*Liability of Executor of Assignee.*)

The provisional assignee of the Insolvent Court, under stat. 1 Geo. 4. c. 119. s. 7., assigned the estate of an insolvent to an assignee, who assented to such assignment and acted under it, as tenant of premises which the insolvent held as lessee for years: *Held*, that after the death of such last-mentioned assignee, his executor was liable to the lessor for breaches of covenant in the lease subsequent to the testator's death, it not appearing that the Insolvent Court had appointed fresh assignees. *Abercrombie Hickman*, 8 Adol. & E. 683.

(*Discharge of Wife.*)

The discharge of the wife under the Insolvent Debtors' Act, 7 Geo. 4. c. 57., before marriage, is a bar to an action against husband and wife, in respect of one of the scheduled debts. *Storr v. Lee*, 9 Adol. & E. 868; S. C. 1 Per. & D. 633.

*Semble*, that where a discharged female insolvent acquires property, and marries, whereby the property vests in her husband, the statute affords no remedy by which it can be made available to her former creditors. *Ibid.*

(*Evidence.*)

If a document be produced, under section 76 of the Insolvent Debtors' Act, 7 Geo. 4. c. 57., with a seal purporting to be the seal of the Insolvent Debtors' Court, it is not necessary to prove that the seal is actually the seal of the Court. *Doc d. Duncan v. Edwards*, 9 Adol. & E. 554; S. C. 1 Per. & D. 408.

Certified copies of the schedule, &c. may be given in evidence under the Insolvent Act, by other parties besides the insolvent and his creditors. *Price v. Asheton*, 1 Younge & C. 441.

(*Effect of Assignment on Action previously commenced.*)

To assumpsit for goods sold and delivered, it is a good plea in bar of further maintenance of the action, that, after action commenced, plaintiff took the benefit of the Insolvent Debtors' Act, 7 Geo. 4. c. 57., and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee. Replication, that after assignment the provisional assignee had notice of such suit and permitted it to continue, until he afterwards, and after the plea pleaded, assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors; and that it is so continued with their assent: *Held* bad, on general demurrer.

*Swann v. Sutton*, 10 Adol. & E. 623;  
S. C. 2 Per. & D. 533.

(*Vesting Order under 1 & 2 Vict.*  
c. 110. s. 37.)

The delivery of a *fi. fa.* to the sheriffs' deputy in London is equivalent to a delivery to the sheriff in the country. The goods of the debtor, therefore, are bound by such delivery to the deputy in London, and the execution creditor cannot be defeated by a vesting Order subsequently made by the Insolvent Court, under 1 & 2 Vict. c. 110. s. 37., although the provisional assignee seize before the sheriff; for such vesting Order is not equivalent to sale in market overt, and passes such interest only as the insolvent himself had in the goods, and subject to his liabilities. *Woodland v. Fuller*, 3 Per. & D. 570.

(*Pleading Discharge.*)

The defendant was indebted to the plaintiff in 11*l.*, and was afterwards discharged from the debt under the Insolvent Debtors' Act. He afterwards accepted a bill of exchange drawn by the plaintiff, for which the consideration was the above sum of 11*l.*, and a further sum, being a new debt. *Held*, in an action on the bill, that he could not plead his discharge under the 7 Geo. 4. c. 57., as an answer to the whole bill, though he might as to the part relating to the old debt. *Sharman v. Thompson*, 3 Per. & D. 656.

To a plea of discharge under the

Insolvent Debtors' Act, replication that plaintiff, though in England, had not been served with notice of the filing of the defendant's petition. *Held*, ill. *Reid v. Croft*, 5 Bing. 68; S. C. 6 Scott, 770.

A defendant, who is under terms to plead issuably, cannot plead that the debt has been discharged under the Insolvent Debtors' Act, and that the cause of action has passed to his assignees. *Wettenhall v. Graham*, 6 Scott, 603.

(*Liability to Surety.*)

A discharged insolvent is liable to repay his surety, who pays for him after his discharge an annuity due before. *Abbott v. Bruere*, 5 Bing. N. C. 598; S. C. 7 Scott, 753.

(*When not released.*)

The defendant was indebted to the plaintiff in two separate sums. On obtaining his discharge under the Insolvent Debtors' Act, he inserted in his schedule one of the debts only. *Held*, that he was not released from the other debt. *Tyers v. Stunt*, 7 Scott, 349.

(*Admissibility of Creditor as a Witness.*)

In a suit by the assignee under the Insolvent Debtors' Act, to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff; and he is not rendered competent by the 3 & 4 Will. 4. c.

42. ss. 26. 27. *Holder v. Hearne*, 1 Beav. 445.

*(Rights of Assignees to Property previously settled.)*

Property was settled on *J. R.* by his father, until he should take the benefit of the Insolvent Debtors' Act; and then the trustees were, during his life, to apply it in such manner and to such persons, for the board, lodging and subsistence of *J. R.* and his family, as the trustees should think proper; and after his decease, upon trust for such persons as *J. R.* should appoint; and in default of appointment, in trust for his children. *J. R.* took the benefit of the Insolvent Debtors' Act. He had three children, but his wife was dead. *Held*, that his children, who were all infants, became entitled to three fourths, and the assignees to one fourth of the life interest of *J. R.* *Rippon v. Norton*, 2 Beav. 63.

*(Liability of future Effects.)*

In May 1819 a party took the benefit of the Insolvent Act then in force: he subsequently acquired property, and died, leaving more than sufficient to pay his debts contracted after his insolvency; the scheduled creditors remaining unpaid. *Held*, that a bill might be maintained by one of such creditors against the personal representatives of the insolvent, without the previous sanction of the Insolvent Debtors' Court, for payment, out of the surplus assets, of

the scheduled debts. *Ward v. Painter*, 2 Beav. 85.

*(Sale, what good.)*

Although the Insolvent Debtors' Act (7 Geo. 4. c. 57. s. 20.) directs the assignees to sell the insolvent's real estates by auction, yet, if they have tried to sell them by auction, and failed, a sale by private contract will be good. *Mather v. Priestman*, 9 Sims. 352.

*(When Assignee entitled to Costs of Suit.)*

The assignee of an insolvent mortgagor, before a bill was filed to foreclose the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors; and by his answer he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 9 Sim. 397.

*(Renewal of Lease.)*

The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. *Price v. Asheton*, 1 Younge & C. 82.

*(Security for Costs.)*

Where a plaintiff, who had been ordered to give security for costs by reason of his insolvency, had failed to comply with the order, he was ordered to give that security within ten



days, or his bill to be dismissed. *Tredwell v. Byrch*, 1 Younge & C. 476.

*(Voluntary Conveyance.)*

A conveyance made to a creditor for a valuable consideration, sufficiently strong in itself to influence the debtor to make it, is not "voluntary," within the stat. 7 Geo. 4. c. 57. s. 82. for relief of insolvent debtors, though part of the consideration consists of a pre-existing debt. *Margaretson v. Saston*, 1 Younge & C. 525.

*(Costs of Equitable Mortgagee.)*

In equity, an equitable mortgagee, though the mortgage be without a written memorandum, will be allowed his costs as against the assignees of the mortgagor, who had taken the benefit of the insolvent act. *Regina v. Chambers*, 4 Younge & C. 54.

*(Meaning of the term "Insolvent".)*

Principles upon which the meaning of the term "insolvent," in the 46 Geo. 3. c. 135. s. 1., is to be determined. *Embarrassment* is not to be confounded with *insolvency*; but where a man's means of present payment are so crippled, and his embarrassment is so great, that he cannot proceed with and carry on his business in the usual course of trade, he is *insolvent*; without reference to the consideration whether the whole of his property, when converted into money and realized, would be sufficient to pay his debts; and notice of such a state of circumstances is notice of in-

solveny. *De Tastet v. Le Tavernier*, 1 Keen, 161.

*(When Insolvency a Defence to Bill for specific Performance.)*

Insolvency is a ground, upon which the Court will refuse specific performance of an agreement to grant a lease; but there must be proof of general insolvency; and a particular default in the payment of rent to the landlord of the premises last occupied by the person contracting for the lease, will not disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility. *Neale v. Mackenzie*, 1 Keen, 473.

INTEREST.

By the terms of a deed of trust, executed by two partners for the benefit of certain persons, some of whom were the joint creditors of the firm, and others the separate creditors of one of the partners, it was declared that the joint creditors should be paid within a year after the execution of the deed, and that the surplus of the joint estate, after payment of the joint creditors, should be applied for the benefit of the separate creditors. Joint estate, sufficient to pay the joint creditors, was got in within the year; but, in consequence of difficulties in relation to the separate creditors, the trustees made no distribution of any of the fund, but caused a suit to be instituted for carrying into execution the deed of

trust, and in the mean time invested at interest both the joint and separate estate. Upon the Court, some years afterwards, decreeing payment to the various creditors,—*Held*, that the joint creditors (although their debts did not in their nature carry interest) were entitled to be paid out of the joint estate interest at 4l. per cent. upon their respective debts, from the time appointed by the deed for the payment of the principal monies due to them; and that, until the joint creditors had received satisfaction both of their principal and interest, the separate creditors were not entitled to receive any payment whatever out of the joint estate. *Pearce v. Slocombe*, 3 Younge & C. 84.

*A.* by indenture assigned certain rents, to which he was entitled for life, to a trustee, upon several successive trusts, for the benefit of certain of *A.*'s creditors who were parties to the deed, and, subject thereto, upon trust to pay the surplus to *A.* By the terms of the deed, the trustee was directed to pay to some of the creditors their *debts*, and to others their *debts with interest*. *Held*, that the latter creditors had a priority over the former in regard to interest, although the former might be entitled to interest, as against the surplus of the estate. *Jenkins v. Perry*, 3 Younge & C. 178.

#### JOINT ESTATE.

At the death of one of two partners, a considerable balance belonging

to the partnership is in the hands of their bankers, a specific portion of which the surviving partner draws out, and hands over to sureties for the completion of a previous arrangement for the purposes of the partnership, upon the understanding that if the arrangement is not carried into effect, the money shall be returned. The arrangement is not completed; and the surviving partner becomes bankrupt, the money still remaining in the hands of the trustees. *Held*, that the money belonged to the joint estate of the two partners, and not to the separate estate of the surviving partner. *Ex parte Leaf, re Simpson*, 4 Deac. 287; *S.C. Mont. & C.* 662.

#### JOINT STOCK COMPANY.

##### *And see* EQUITABLE MORTGAGE.

One of the proprietors of a joint stock banking company having failed to pay the amount of a further call upon his shares, and having become bankrupt: *Held*, that the company had no right of proof for the amount of such call, before an account was taken of the debts and credits of the partnership. *Ex parte Snape, re Rainsford*, 4 Deac. 164; *S.C. Mont. & C.* 607.

A joint creditor of a joint stock banking company may prove the amount of his debt, under a separate fiat against one of the members of the company, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certifi-

cate; notwithstanding, previous to the issuing of the fiat, several other members of the company had become bankrupts, and one had died. *Ex parte Marston, re Marston*, 4 Deac. 191; *S. C. Mont. & C.* 576.

The directors of a private company, formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial, it appeared that there was another director, not named as plaintiff, who had become bankrupt, and had ceased and declined to act, or attend the board of directors, when the contract was made. *Held*, on non-assumpsit, that the plaintiffs ought to have produced the deed, to show that they had authority, in the character of directors, to sue for the company, and also to show that the office of director was determined by bankruptcy, or by voluntarily ceasing to act. *Phelps v. Lyle*, 10 Adol. & E. 113; *S. C. 2 Per. & D.* 314.

The bankrupt having taken some shares in a joint banking company, a return was filed at the Stamp Office on the 2nd Nov. 1838, pursuant to the directions of the 7 *Geo. 4. c. 46.*, in which his name was entered as one of the members of the company. On the 9th Nov. the bankrupt agreed to sell his shares to *B.*, but the deed of transfer of the shares was not executed till the 9th March 1839, nor was any fresh return sent into the Stamp Office, notifying the change of ownership, until the 25th March 1839; but notice of the sale of the

shares to *B.* was given to the bank on the 13th Nov. 1838; and in Dec. 1838 he was appointed one of the directors of the company, as the owner of such shares. On the 19th Feb. 1839, the banking company indorsed bills to the petitioners. *Held*, that the bankrupt was to be considered as a partner in the banking company, at the time of the indorsement on the bills; and that the petitioners might therefore prove against his estate, for the purpose of voting in the choice of assignees, and assenting to or dissenting from his certificate. *Ex parte Prescott, re Phillips*, 4 Dea. 253.

## LANDLORD AND TENANT.

*See LEASE—FIXTURES.*

### LEASE.

The defendant by indenture demised to *E. and W.* a fulling mill for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants that at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor; but if it should be greater, the surplus should be paid by the lessor to the lessee. During the existence of the lease, the lessees became bankrupts, and their assignees declined to take the lease; but they

required the defendant to appoint a person to value the machinery; and on his refusal to do so appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the original valuation. The assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay. *Held*, that the assignees (having demanded the machinery) were entitled to recover it in trover; and that their remedy was not by an action on the covenants which had been determined by the bankruptcy, and by their refusal to take to the lease. *Fairburn v. Eastwood*, 6 Mees. & W. 846.

A lessee, under an unwritten contract reserving rent on the 6th April and the 6th October, became bankrupt, and a fiat issued in March, the rent due in the previous October having been paid. Upon the assignees refusing to take the premises, the bankrupt, within fourteen days after his receiving notice of such refusal, and one day before the 6th of April, offered to deliver up possession to the lessor. *Held*, that under statute 6 Geo. 4. c. 16. s. 75., he was not liable, in assumpsit for use and occupation, to pay any thing in respect of the time subsequent to the 6th October. *Slack v. Sharpe*, 8 Adol. & E. 566.

Where the bankrupt holds by an unwritten lease, offering possession is a delivery, within sect. 75. *Ibid.*

*(Liability of Executors of Assignees.)*

The provisional assignee of the Insolvent Court, under statute 1 Geo. 4. c. 119. s. 7., assigned the estate of an insolvent to an assignee, who assented to such assignment, and acted under it, as tenant of premises which the insolvent held as lessee for years. *Held*, that after the death of such last mentioned assignee, his executor was liable to the lessor for breach of covenant in the lease subsequent to the testator's death; it not appearing that the Insolvent Court had appointed fresh assignees. *Abercrombie v. Hickman*, 8 Adol. & E. 683.

The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. *Price v. Ashton*, 1 Younge & C. 82.

## LEGACY.

*T. B.* was indebted to *C. B.*, his sister, in the sum of 1878*l.* He became bankrupt; and shortly after his bankruptcy *C. B.* made her will, whereby she gave legacies of 500*l.* and 2000*l.* to her executors, in trust to pay the interest thereof (as to the 500*l.* after the decease of her mother) to *T. B.* for his life, without power of anticipation, and free from his debts; and after his decease to pay the principal to such persons as he should appoint; and in default of appointment, to his executors and administrators, for his and their own

use and benefit. *T. B.* died, without having obtained his certificate, and without having attempted to make any appointment. *Held*, that the executors of the testatrix had no right to set off the debt due from *T. B.* to the testatrix, against the legacies; but that the assignee of *T. B.* was entitled to so much of the legacies, as the assets were sufficient to pay. *Cherry v. Boulton*, 2 Keen, 319.

#### LEX LOCI CONTRACTUS.

The bankrupts deposited with a creditor the title deeds of a real estate in Scotland, accompanied with a written agreement to secure the payment of the general balance; both parties being resident in England, where the transaction itself took place. By the law of Scotland, no lien, or equitable mortgage on real property is created by such a deposit. *Held*, nevertheless, that the contract being made in England by contracting parties domiciled in this country, which was also the domicile of the assignees under the bankruptcy, the estate was charged with the equitable mortgage, and that the assignees were bound to pay to the creditor the amount of the proceeds of the sale of the estate. *Ex parte Pollard, re Courtney*, 4 Deac. 37; *S. C. Mont. & C.* 239, 253, 643. Reversing judgment in *Ex parte Pollard*, 2 Deac. 367.

#### LICENSE OF PUBLIC-HOUSE.

*See* MORTGAGE.

#### LIEN.

*And see* EQUITABLE MORTGAGE.

The solicitor to the petitioning creditor has an equitable lien on money in his hands belonging to the assignees, for the amount of the petitioning creditor's bill of costs; although the solicitor might not have a right to set off the amount of such costs, in an action at law by the assignees. *Ex parte Smythies, re Southall*, 4 Deac. 118; *S. C. Mont. & C.* 346, 656.

*D.*, being captain of a ship bound to the East Indies, and proprietor of the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On the 18th October, while the ship was on her voyage home, *D.*, being indebted to the owner, gave him a written order as follows:—"I hereby authorize you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th December, and a fiat in bankruptcy was issued against *D.* on the 18th, on an act of bankruptcy committed on the 2nd. *Held*, that *D.*'s assignees could not recover against the owner, in trover for the cabin furniture. *Belcher v. Oldfield*, 6 Bing. N. C. 102; *S. C.* 8 Scott, 221.

#### LUNATIC.

*A.* and *B.* dissolve their partner-

ship, when it is agreed between them that *B.* shall retire, and that *A.* shall continue the business, and receive and pay all the partnership debts. At the time of the dissolution of the partnership, *C.*, a lunatic, is a creditor to a large amount, having given *D.* a general power of attorney to act for him in the transaction of his affairs; and *D.* assents to the arrangement between *A.* and *B.*, and agrees to accept *A.* as the separate debtor. A commission of lunacy afterwards issues against *C.*, under which he is found by the inquisition to have become lunatic three days before the date of the power of attorney; and *D.* is appointed his committee; *A.* afterwards becomes bankrupt. *Held*, 1st, that *D.* might prove the amount of *C.*'s debt against the separate estate of *A.*; and 2dly, that the power of attorney, being for the benefit of *C.*, was not vacated by the subsequent proceedings in his lunacy. *Ex parte Bradbury, re Walden*, 4 Deac. 202; *S. C. Mont. & C.* 625.

#### MARRIAGE SETTLEMENT.

*A.*, upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at *S.*, for securing to them a sum of 15,000*l.*, the trusts of which were declared to be for *A.* for life, and afterwards for the benefit of his wife and children. *A.*, not having paid this sum at the time specified in the bond, without notice to the trustees, assigned his life interest therein

to *B.*, as a security for the repayment of a debt due from *A.* to *B.* *A.* having afterwards become bankrupt, *B.* filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of his security; and a decree was made in that suit, directing the life interest of *A.* in the 15,000*l.* to be sold, and the produce to be paid to *B.* In the course of the proceedings in the bankruptcy, the assignees sold the *S.* estates; but the proceeds of the sale did not amount to 15,000*l.* *Held*, that the trustees were entitled, as against *B.*, to retain the annual produce of the sum for which the *S.* estates were actually sold, until the whole of the 15,000*l.* should be re-instated. *Smith v. Smith*, 1 Younge & C. 338.

#### MISNOMER.

One of two partners against whom a docket was struck, after being rightly named in two previous parts of the affidavit, was misnamed "*Jacob*," instead of "*James*." *Quære*, whether such an error was material. But leave was given to amend, without prejudice to the rights of any other creditors. *Re Sale*, 4 Deac. 137; *S. C. Mont. & C.* 350.

#### MORTGAGE.

*And see* EQUITABLE MORTGAGE.  
(*Mortgagee's Right to Fixtures.*)

Where a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards

became bankrupt: *Held*, that the mortgagee might declare in case, as reversioner, against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage; although there was a covenant in the original lease to the mortgagor, to yield up to the lessor at the determination of the term, "all fixtures and things to the premises belonging or to belong." *Hitchman v. Walton*, 4 Mee. & W. 409.

(*Public-house Licence.*)

One *R.*, possessed of a licensed public house, mortgaged the premises, together with the licence. After the licence had been suspended for irregular conduct on the part of *R.*, the mortgagees sold the premises, under a power of sale contained in the deed. The defendant, the assignee of *R.*, who had in the mean time become bankrupt, obtained a new licence in the name of the purchaser, for which the latter paid him 150*l.* *Held*, that this was not money had and received to the use of the mortgagees. *Mansfield v. Morris*, 7 Scott, 404.

*Quære*, whether public house licences can properly be the subject of separate sale. *Ibid.*

(*Costs of Suit to foreclose.*)

The assignee of an insolvent mort-

gagor, before a bill was filed to foreclose the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors; and by his answer he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 9 Sim. 397.

(*What a good Delivery of Mortgage Deed.*)

*A.*, being indebted to his bankers, executed a deed, purporting to be a mortgage to them, for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till *A.*'s bankruptcy, which occurred about a month afterwards. The attorney then delivered it to the mortgagees. *Held*, that this was a good delivery by *A.* to the mortgagees. *Grurgeon v. Gerrard*, 4 Younge & C. 119.

## MUTUAL CREDIT.

### *See SET-OFF.*

## NEW PROMISE, &c.

Where an insolvent debtor was remanded for six months, at the suit of *G.*, and during his imprisonment *A.*, the attorney of *G.*, agreed with him that he should be discharged, on giving *A.* a bill of exchange for a part of *G.*'s debt, and an I. O. U. for *A.*'s bill of costs in the action; which he gave and was liberated accordingly; *Held*, that the insolvent could not be

sued, either on the bill of exchange, or on the I. O. U. *Ashley v. Killick*, 5 Mee. & W. 509.

The defendant was indebted to the plaintiff in 11*l.*, and was afterwards discharged from the debt under the Insolvent Debtors' Act. He afterwards accepted a bill of exchange drawn by the plaintiff, for which the consideration was the above sum of 11*l.*, and a further sum, being a new debt. *Held*, in an action on the bill, that he could not plead his discharge under the 7 *Geo.* 4. c. 57., as an answer to the whole bill, though he might as to the part relating to the old debt. *Sharman v. Thompson*, 3 Per. & D. 656.

#### NOTICE.

(*By a Party having an Equitable Lien.*)  
See EQUITABLE MORTGAGE.

(*Of Act of Bankruptcy.*)

See RELATION TO ACT OF BANKRUPTCY

#### OPENING FIAT.

See FIAT.

#### OPERATION OF STATUTES.

See STATUTES.

#### ORDER.

Where an Order is made by the Court of Review, under 6 *Geo.* 4. c. 16. s. 18., to cause a fiat in bankruptcy to be proceeded with, notwithstanding the petitioning creditor's debt has been found insufficient, the petition on which the Order is made

cannot be used to explain any ambiguity in the Order. Where therefore an Order recited, that *G. H.*, public registered officer of the N. and C. Bank, had petitioned the Court that the fiat should be proceeded with, and adjudicated that the debt of *J. C.*, the petitioning creditor, was an insufficient debt, and that the debt of the N. and C. Bank, *proved under the fiat*, was so incurred not anterior to the debt of the said banking company; *Held*, that the Order was invalid, as it did not state distinctly that the debt of the N. and C. Bank had been proved before the petition was presented. *Christie v. Unwin*, 3 Per. & D. 204.

A clerical error, however, will not vitiate the Order. *Held*, therefore, that stating the debt of the N. and C. Bank to have been incurred not anterior to the debt "of the said banking company," instead "of *J. C.*," was immaterial. *Ibid*.

#### ORDER AND DISPOSITION.

See EQUITABLE MORTGAGE—  
REPUTED OWNERSHIP.

#### PARTNERS.

And see AFFIDAVIT.

Two partners, to secure a partnership debt, conveyed certain joint property particularly described in the deed, "and all other the hereditaments of them, or either of them, situate elsewhere in the town of Morpeth;" the recitals, covenants, and premises in the deed relating solely to the joint



property. *Held*, that the operation of the deed extended to a separate estate of one of the partners in the town of Morpeth. *Ex parte Young, re Gowen*, 4 Deac. 185; S. C. Mont. & C. 599.

(*Proof under separate Fiat.*)

A joint creditor of a joint stock banking company may prove the amount of his debt under a separate fiat against one of the members of the company, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate; notwithstanding, previous to the issuing of the fiat, several other members of the company had become bankrupts, and one had died. *Ex parte Marston, re Marston*, 4 Deac. 191; S. C. Mont. & C. 576.

A. and B. dissolve their partnership, when it is agreed between them that B. shall retire, and that A. shall continue the business, and receive and pay all the partnership debts. At the time of the dissolution of the partnership, C., a lunatic, is a creditor to a large amount, having given D. a general power of attorney to act for him in the transaction of his affairs; and D. assents to the arrangement between A. and B., and agrees to accept A. as the separate debtor. A commission of lunacy afterwards issues against C., under which he is found by the inquisition to have become a lunatic three days before the date of the power of attorney, and D. is appointed his committee; A. afterwards becomes bankrupt. *Held*, 1. that D.

might prove the amount of C.'s debt against the separate estate of A.; and 2. that the power of attorney, being for the benefit of C., was not vacated by the subsequent proceedings in his lunacy. *Ex parte Bradbury, re Walden*, 4 Deac. 202; S. C. Mont. & C. 625.

The bankrupt having taken some shares in a joint stock banking company, a return was filed at the Stamp Office on the 2d November 1838, pursuant to the directions of the 7 Geo. 4. c. 46., in which his name was entered as one of the members of the company. On the 9th November the bankrupt agreed to sell his shares to B., but the deed of transfer of the shares was not executed till the 9th March 1839, nor was any fresh return sent into the Stamp Office notifying the change of ownership, until the 25th March 1839; but notice of the sale of the shares to B. was given to the bank on the 13th November 1838, and in December 1838, he was appointed one of the directors of the company, as the owner of such shares. On the 19th February 1839, the banking company indorsed bills to the petitioners. *Held*, that the bankrupt was to be considered as a partner in the banking company at the time of the indorsement on the bills, and that the petitioners might therefore prove against his estate, for the purpose of voting in the choice of assignees, and assenting to or dissenting from his certificate. *Ex parte Prescott, re Phillips*, 4 Deac. 253.

*(Non-joinder of, in Action.)*

The directors of a private company, formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial, it appeared that there was another director, not named as plaintiff, who had become bankrupt, and had ceased and declined to act or attend the board of directors, when the contract was made. *Held*, on non assumpsit, that the plaintiffs ought to have produced the deed, to show that they had authority, in the character of directors, to sue for the company, and also to show that the office of director was determined by bankruptcy, or by voluntarily ceasing to act. *Phelps v. Lyle*, 10 Adol. & E. 113; *S. C.* 2 Per. & D. 314.

*(Set-off between.)*

Upon a dissolution of partnership, the defendant agreed to pay his co-partners 681*l.* 9*s.* 8*d.*, as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891*l.* 12*s.* due from the firm to *H.* After the dissolution they became bankrupts, and never paid *H.* *Held*, that in an action by their assignee for the 681*l.* 9*s.* 8*d.*, the defendant could not set off their undertaking to pay the 51,891*l.* 12*s.* to *H.* *Abbott v. Hicks*, 5 Bing. N. C. 578; *S. C.* 7 Scott, 717.

*(Liability of retiring Partner.)*

Partners being indebted to their bankers, it was agreed between them that one should retire; that the assets should be transferred to the continu-

ing partners, who were to take upon themselves the partnership liabilities; and that the bankers should release the retiring partner from his liability. The bankers signed a memorandum according to the agreement, and having afterwards attempted to make the retiring partner a bankrupt, by proceeding under the 8th section of the 1 & 2 *Vict.* c. 110. (the act for the abolition of imprisonment for debt), they were restrained from so doing by injunction. *Atwood v. Banks*, 2 Beav. 192.

*(What is Joint Estate.)*

At the death of one of two partners, a considerable balance belonging to the partnership is in the hands of their bankers, a specific portion of which the surviving partner draws out, and hands over to sureties for the completion of a previous arrangement for the purposes of the partnership, upon the understanding that if the arrangement is not carried into effect, the money shall be returned. The arrangement is not completed; and the surviving partner becomes bankrupt; the money still remaining in the hands of the trustees. *Held*, that the money belonged to the joint estate of the two partners, and not to the separate estate of the surviving partner. *Ex parte Leaf, re Simpson*, 4 Deac. 287; *S. C.* Mont. & C. 662.

## PAYMENT.

*(When protected.)*

A bankrupt having, within two months before the fiat, deposited

chattels by way of pledge, in consideration of an advance of money; *Held*, that the transaction, though *bond fide*, and without notice of an act of bankruptcy, was not protected by sect. 82 of 6 Geo. 4. c. 16., and that the assignees might recover in trover. *Fearnley v. Wright*, 6 Bing. N. C. 446; *S. C.* 6 Scott, 813.

### PENSION.

The pension payable to a military officer, on his retirement from the service of the East India Company, does not, upon his bankruptcy, pass to his assignees; such pension not being granted by *deed*, and consequently not recoverable by an action at law. *Gibson v. East India Company*, 7 Scott, 74; *S. C.* 5 Bing. N. C. 262.

### PETITION.

#### (Hearing of.)

Although the petitioner refuses to submit to the jurisdiction of the Court, in case it should make an adverse order against him on a point arising out of, but not directly brought before the Court by, his petition, the respondent cannot object to the further hearing of the petition. *Ex parte Coleman, re Hood*, 4 Deac. 242.

### PETITIONING CREDITOR.

#### (Substitution of Debt.)

Where the petitioning creditor's debt was on a bill of exchange, which was not in his hands when the fiat was sued out, the debt of another creditor was substituted, at the costs

of the petitioning creditor. *Ex parte Cattley, re Goodwin*, 4 Deac. 138; *S. C.* Mont. & C. 360.

Where an Order is made by the Court of Review, under 6 Geo. 4. c. 16. s. 18., to cause a fiat in bankruptcy to be proceeded with, notwithstanding the petitioning creditor's debt has been found insufficient, the petition on which the Order is made cannot be used to explain any ambiguity in the Order. Where, therefore, an Order recited that *G. H.*, public registered officer of the N. and C. bank, had petitioned the Court that the fiat should be proceeded with, and adjudicated that the debt of *J. C.*, the petitioning creditor, was an insufficient debt, and that the debt of the N. and C. bank, *proved under the fiat*, was so incurred not anterior to the debt of *the said banking company*; *Held*, that the Order was invalid, as it did not state distinctly, that the debt of the N. and C. bank had been *proved, before the petition was presented*. *Christie v. Unwin*, 3 Per. & D. 204.

A clerical error, however, will not vitiate such an Order. *Held*, therefore, that stating the debt of the N. and C. bank to have been incurred not anterior to the debt "of the said banking company," instead "of *J. C.*," was immaterial. *Ibid*.

Under 6 Geo. 4. c. 16., where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Court of Review orders the fiat to be proceeded with, on proof of

a sufficient debt by any other creditor, the debt of the other creditor may be added to that of the petitioning creditor, to make up the requisite amount. *Byers v. Southwell*, 6 Bing. N. C. 39; *S. C.* 8 Scott, 238.

*(Receiving Part of Debt.)*

Where a petitioning creditor, in perfect ignorance of the illegality of the transaction, received part of his debt from the bankrupt, after the issuing of the fiat, and had refunded what he had so received, with the approbation of the Commissioners; the Court, on the application of the assignees, ordered the fiat to be proceeded in. *Ex parte Nesbitt, re Mould*, 4 Deac. 171; *S. C. Mont. & C.* 362.

*(Forfeiture of Debt.)*

To assumpsit for goods sold, the defendant pleaded, that after the debt was contracted he became a bankrupt, and that a fiat was issued against him on the petition of the plaintiff; that, before the defendant was adjudged a bankrupt under the fiat, an agreement was made between them, under which the plaintiff abandoned all proceedings, in consideration of the defendant giving him a bill of exchange as a security for part of his debt. *Held*, on special demurrer, that the plea did not show the debt to be forfeited, within 6 Geo. 4. c. 16. s. 8.; as there was no averment that the plaintiff had or could have received by the agreement more

than the other creditors, or that the defendant had not assets to pay all his creditors their demands in full, or that the fiat had been proceeded with. *Davis v. Holding*, 3 Per. & D. 413.

*(Attendance at Opening of Fiat.)*

An Order was made, *nunc pro tunc*, for dispensing with the petitioning creditor's attendance at the opening of the fiat. *Ex parte Whibley, re Atkinson*, 4 Deac. 263; *S. C. Mont. & C.* 642.

PETITIONING CREDITOR'S DEBT.

Where part of the petitioning creditor's debt is contracted after the bankrupt ceased to trade, and the remainder does not amount to 100*l.*, it is not sufficient to support the fiat. *Ex parte Dalby, re Dalby*, 4 Deac. 261; *S. C. Mont. & C.* 636.

Where a petitioning creditor's debt was made up of a sum paid by him in part discharge, only, of a bill of exchange, which he had accepted as surety for the bankrupt, but the bill itself continued in the hands of an adverse holder; *Held* bad. *Ex parte Caldecott, re Heath*, 4 Deac. 264; *S. C. Mont. & C.* 600.

PLEADING.

*See* ACTIONS AND SUITS—BANKRUPT  
(*Actions by and against*)—EVIDENCE  
—SET-OFF.

POWER.

*A.*, by his marriage settlement;

conveyed his real estates to trustees and their heirs, to the use of himself for life, with remainder to the same trustees, to preserve contingent uses; and, after the death of *A.*, to other trustees, for a term of years, to secure a jointure for his wife; with remainder to the use of such children of the marriage as the husband and wife jointly, and in default of a joint appointment the survivor of them, should appoint; with remainder, in default of any appointment, to all and every the sons and daughters of the marriage living at the death of the survivor of the husband and wife, and the children (also living at such period) of such sons and daughters as should be then dead, in equal shares, as tenants in common; with remainder to the right heirs of the settlor. *A.* became bankrupt before he had made any appointment. After his bankruptcy, he and his wife executed a deed, purporting to be a joint appointment; and, after the death of the bankrupt, and subsequently to the filing of the bill, his widow executed a deed, purporting to be an appointment to the same children, in whose favour the joint appointment had been made. *Held*, that the joint power was destroyed by the bankruptcy; and that the contingent limitation to the children, in default of appointment, having failed for want of a particular estate of freehold to support it, the appointment by the surviving wife was invalid. *Hale v. Escott*, 2 Keen, 444.

## PRACTICE.

*And see* FIAT—PETITION, &c.

(*Default of Appearance.*)

On a petition to prove, if the assignees do not appear, the Order cannot be taken, unless there is an affidavit that they were personally served with the petition; service on their solicitor, who had undertaken to accept it, is not enough. *Ex parte Baker, re Scott*, 4 Deac. 55; *S. C. Mont. & C.* 156.

*Seem*, that petition must state the grounds on which the proof was rejected by the Commissioners. *Ibid.*

(*Under 1 & 2 Vict. c. 110. s. 8.*)

A creditor, after filing an affidavit of debt to the amount of 100*l.*, and upwards, under the 1 & 2 *Vict. c. 10. s. 8.*, upon which a bond was taken by the Commissioner in 200*l.*, filed a second affidavit, stating the real amount of his debt, viz. 361*2l.* The Court declined making an Order for taking the second affidavit off the file. *Ex parte Rose*, 4 Deac. 66; *S. C. Mont. & C.* 149, 334.

*And see further* AFFIDAVIT.

## PREFERENCE.

*See* FRAUDULENT PREFERENCE.

## PRIVILEGE.

*See* ARREST.

## PROOF.

(*Against Trustee.*)

A petition to prove against a bankrupt trustee alleged various breaches

of trust. *Held*, that the Court could only make the common Order for the petitioners to go in and make such proof as they were able. *Ex parte Smith, re Clarke*, 4 Deac. 123; *S. C. Mont. & C. 347.*

(*Between Partners.*)

One of the proprietors of a joint stock banking company having failed to pay the amount of a further call upon his shares, and having become bankrupt: *Held*, that the company had no right of proof for the amount of such call, before an account was taken of the debts and credits of the partnership. *Ex parte Snape, re Rainsford*, 4 Deac. 164; *S. C. Mont. & C. 607.*

(*Attendance of Creditor.*)

*Semble*, the Commissioners have a discretionary power in requiring or dispensing with the personal attendance of a creditor, in all matters of proof; and this Court will not interfere on the subject. *Ex parte Shaw, re Kirkby*, 4 Deac. 190; *S. C. Mont. & C. 624.*

(*Under separate Fiat.*)

A joint creditor of a joint stock banking company may prove the amount of his debt under a separate fiat against one of the members of the company, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate; notwithstanding, previous to the issuing of the fiat, several

other members of the company had become bankrupts, and one had died. *Ex parte Marston, re Marston*, 4 Deac. 191; *S. C. Mont. & C. 576.*

*A. and B.* dissolve their partnership, when it is agreed between them, that *B.* shall retire, and that *A.* shall continue the business, and receive and pay all the partnership debts. At the time of the dissolution of the partnership, *C.*, a lunatic, is a creditor to a large amount, having given *D.* a general power of attorney to act for him in the transaction of his affairs; and *D.* assents to the arrangement between *A.* and *B.*, and agrees to accept *A.* as the separate debtor. A commission of lunacy afterwards issues against *C.*, under which he is found by the inquisition to have become a lunatic three days before the date of the power of attorney; and *D.* is appointed his committee. *A.* afterwards becomes bankrupt. *Held*, 1st, that *D.* might prove the amount of *C.*'s debt against the separate estate of *A.*; and 2dly, that the power of attorney, being for the benefit of *C.*, was not vacated by the subsequent proceedings in his lunacy. *Ex parte Bradbury, re Walden*, 4 Deac. 202; *S. C. Mont. & C. 625.*

The bankrupt having taken some shares in a joint banking company, a return was filed at the Stamp Office on the 2nd November 1838, pursuant to the directions of the 7 *Geo. 4. c. 46.*, in which his name was entered as one of the members of the company. On the 9th November the

bankrupt agreed to sell his shares to *B.*; but the deed of transfer of the shares was not executed till the 9th March 1839, nor was any fresh return sent into the Stamp Office, notifying the change of ownership until the 25th March 1839; but notice of the sale of the shares to *B.* was given to the bank on the 13th November 1838; and, in December 1838, he was appointed one of the directors of the company, as the owner of such shares. On the 19th February 1839, the banking company indorsed bills to the petitioners. *Held*, that the bankrupt was to be considered as a partner in the banking company at the time of the indorsement on the bills, and that the petitioners might therefore prove against his estate, for the purpose of voting in the choice of assignees, and assenting to or dissenting from his certificate. *Ex parte Prescott, re Phillips*, 4 Deac. 253.

*(Unliquidated Damages.)*

In a special case it was stated, that, by contract between *B.* and *G.*, *G.* had agreed to sell to *B.* all the oil which should arrive by a certain ship, which *B.* was to receive within fourteen days after the landing of the cargo, and pay for at the expiration of that time by bill or money, at a specified price per tun, with customary allowance; that the ship arrived, and the cargo was landed, and *G.* tendered the oil to *B.* at the end of the fourteen days; that the quantity of oil, after allowances, &c., was a

certain number of tuns stated in the case; that, at the time of the tender, the market price of oil was lower than the contract price by an amount stated; that *B.*, on the tender being made, refused to accept; and that the difference of prices was within the knowledge of the parties. *Held*, that *B.*, having become bankrupt after the refusal, *G.* could not prove for this breach of contract under the fiat; for, although *G.*'s claim would be measured by the difference between the contract and market prices at the time when *B.* should have fulfilled his contract, yet the case did not show that the data on which the calculation must proceed were so settled as to admit of no dispute, and render the intervention of a jury unnecessary; and consequently the claim of *G.* was not for a debt, but for damages. *Green v. Bicknell*, 8 Adol. & E. 701.

*(When it amounts to an Election.)*

Where under a bankruptcy parties have proved their debts, on the footing of holding no security, they will not generally be permitted to withdraw their proof, and set up a security; but ignorance of the existence of a security may be ground for granting relief to a party who has so proved. *Grurgeon v. Gerrard*, 4 Younge & C. 119.

PUBLIC HOUSE LICENSE.

*See* MORTGAGE.

## REFERENCE.

On a reference to the registrar, it is not incumbent on a party to bring in a formal state of facts, if it is not required by the registrar. *Ex parte Smythies, re Southall*, 4 Deac. 110; S. C. Mont. & C. 346, 656.

On such reference the affidavits filed in support of the petition are receivable by the registrar in evidence; and he is not bound to examine the parties *visd voce*. *Ibid.*; 4 Deac. 112.

On a reference to the registrar to tax the costs of an action brought by assignees, he may tax the costs of an application to this Court for an Order to substitute another petitioning creditor's debt, for the purpose of enabling the assignees to recover in such action. *Ibid.*; 4 Deac. 114.

## REFUNDING.

*A.* accepted four bills for the accommodation of *B.*, which *B.* indorsed, and deposited with his bankers, to secure any floating balance. *B.* became bankrupt; when the bankers proved for a balance greatly exceeding the amount of the bills, excepting in their proof these bills, with others, as securities; and they afterwards received a dividend of 2s. in the pound on the amount of their proof. The bills were subsequently paid in full by *A.* *Held*, that *A.* had a right to call on the bankers to refund the amount of the dividend of 2s. on the amount of the bills. *Ex parte Holmes, re Garner*, 4 Deac. 82;

S. C. Mont. & C. 301; reversing *Ex parte Holmes*, 3 Deac. 662.

## RELATION TO ACT OF BANKRUPTCY.

A bankrupt having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money: *Held*, that the transaction, though *bond fide*, and without notice of an act of bankruptcy, was not protected by sect. 82 of 6 Geo. 4. c. 16; and that the assignees might recover in trover. *Fearnley v. Wright*, 6 Bing. N. C. 446; S. C. 6 Scott, 813.

But now by 2 & 3 Vict. c. 29., all contracts, dealings, and transactions, by and with any bankrupt, really and *bond fide* made, and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such act of bankruptcy committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided, also, that nothing therein con-



tained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor, or to any execution founded on a judgment on a warrant of attorney, or cognovit, given by any bankrupt by way of such fraudulent preference.

### REGISTRAR.

One of the deputy registrars, having resigned his office and taken the benefit of the Insolvent Act, applied to the Court of Review to order the accountant in bankruptcy to pay him the balance of salary due to him, the assignees under the insolvency having refused to receive it; the Court declined making any order; but the Lord Chancellor afterwards granted the application. *Ex parte Boussfeld*, 4 Deas. 45; 8 C. Mont. & C. 41.

The registrar of the Commissioner of Bankrupts' Court is an officer of the Court of Chancery, and, as such, entitled to privilege from arrest under a *ca. sa.* *Re Collins*, 1 Sausse & Scully (Irish), 73.

But *semble*, that the Court will discountenance applications for such protection of privilege on the part of its officers. *Ibid.*

### RENT.

*See* LEASE.

### REPORT.

*See* EXCEPTING TO REPORT.

### REPUTED OWNERSHIP.

*And see* EQUITABLE MORTGAGE.

The plaintiff, at the recommendation of *B.*, sent goods to a dyer, who was told by plaintiff's son that *B.* would give directions about them; *B.* called and gave directions; and afterwards became bankrupt. *Held*, in an action of trover for these goods brought by the plaintiff against *B.*'s assignees, that the directions given by *B.* were admissible in evidence for the assignees. *Sharpe v. Newsholme*, 5 Bing. N.C. 713; 5 S.C. 8 Scott, 21.

*A.*, on behalf of the owner of a ship, entered into a charter-party with *B.*, by which *B.* agreed to pay to *A.*, on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to *C.*, as a security for a debt; and *C.* gave notice of the assignment to *A.*, but not to *B.* The owner having subsequently become bankrupt, it was held, that the arrears of freight were not in his order and disposition at the time of his bankruptcy. *Gardner v. Lachlan*, 4 Myl. & C. 129.

Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money,—in other words, the party holding the property at the order and disposition of the trader. *Ibid.*

## REVOCATION OF AUTHORITY.

*(When Bankruptcy amounts to.)*

*H.*, a manufacturer, had been accustomed to consign goods, by the agency of *O. & Co.*, commission merchants, to houses in America for sale on *H.'s* account. *O. & Co.* made advances to *H.* on the consignments, received the proceeds as his agents, and accounted to him, repaying themselves their commission, advances, and other charges. In 1831, *H.*, being indebted to *O. & Co.* for such advances and charges, and likewise owing 5000*l.* to his own bankers, wrote to *O. & Co.*, authorizing them, after paying themselves their balance out of the net proceeds of *H.'s* shipments down to that date, to pay *R. & Co.* the bankers half the remainder of such proceeds; so that the payment should not exceed 5000*l.* *O. & Co.* thereupon wrote to *R. & Co.*, stating that they, agreeably to *H.'s* authority, engaged to pay *R. & Co.* (after liquidating their own balance) a proportion of the remaining proceeds &c. (as in *H.'s* letter) in consideration of *R. & Co.* guaranteeing *O. & Co.* from claims by any other party, in consequence of such payment. *R. & Co.* then wrote to *O. & Co.*, that, understanding from *H.* that *O. & Co.* had agreed to pay any surplus, balance, &c. (as in *H.'s* letter) they, *R. & Co.* agreed to guarantee *O. & Co.* against such other claims. A few days before this correspondence, *H.* had transmitted to *O. & Co.* a letter of

authority resembling that afterwards sent, and had seen a draft of a letter from them to *R. & Co.*, like that afterwards sent by *O. & Co.* to *R. & Co.*, claiming a guarantee as above; but this first authority was revoked, and never acted upon. In 1833 *H.* became bankrupt. The assignees gave *O. & Co.* notice, not to make any payments out of *H.'s* effects, except to them. Afterwards *O. & Co.* received proceeds of sales from the houses abroad, and paid them over to *R. & Co.*, according to the authority given by *H.* The assignees sued *O. & Co.* for the amount, as money had and received to their use. *Held*, that the transaction between *H.*, *O. & Co.* and *R. & Co.* was either a valid appropriation, or equitable assignment of funds, to the amount of 5000*l.*, in favour of *R. & Co.*, and was not revoked by *H.'s* bankruptcy. *Hutchinson v. Heyworth*, 9 Adol. & E. 375; *S. C.* 1 Per. & D. 266.

## SALE.

*And see FRAUDULENT SALE.*

Although the Insolvent Debtors' Act, 7 Geo. 4. c. 57. s. 20., directs the assignees to sell the insolvent's real estate by auction, yet if they have tried to sell them by auction and failed, a sale by private contract will be good. *Mather v. Priestman*, 9 Sim. 352.

Where the bankrupt had been employed as a broker by the petitioners to sell a parcel of goods, and secretly agreed with the buyer to share the

profit or loss of the transaction, in lieu of brokerage; and part of the goods remained in the bankrupt's hands at the time of his bankruptcy; *Held*, that the transaction was fraudulent, as against the petitioners, and the sale void; and that the assignees were bound to deliver up to the petitioners the remaining portion of the goods. *Ex parte Huth, re Pemberton*, 4 Dea. 294; *S. C. Mont. & C.* 667.

### SCIRE FACIAS.

*See* ACTIONS.

### SECOND FIAT.

*See* FIAT.

### SECURITY FOR COSTS.

*See* COSTS.

### SET-OFF.

(*Unliquidated Damages.*)

Declaration by assignees of *R.*, a bankrupt, stated that defendant, in consideration that *R.* would sell and deliver to him sugars at a certain rate and price, agreed to pay him for the same, prompt two months, or an acceptance of seventy days, if required; that the goods were delivered to and received by the defendant, before the bankruptcy, on the terms aforesaid, but he did not, though required before the bankruptcy, pay then or since by an acceptance, nor did he otherwise pay; whereby *R.*, before his bankruptcy, lost the use and benefit of such acceptance, and

the benefit which would have accrued to him from having it discounted, and raising money on it for his use in the way of his trade, and was put to loss and inconvenience by not having such acceptance to negotiate; *and his estate applicable to the payment of his just debts was, by reason of the non-payment for the goods in manner aforesaid, diminished in value, to the damage of the assignees and creditors.* Plea, set-off for a debt due from *R.* before his bankruptcy. Demurrer. *Held*, that the concluding averments of the declaration did not show a special damage to the plaintiffs, but only a common pecuniary loss: that the case appearing on the declaration was one of mutual credit, within the stat. 6 Geo. 4. c. 16. s. 50., and that a set-off might be pleaded. *Groom v. West*, 8 Adol. & E. 758; *S. C.* 1 Per. & D. 19.

(*Between Partners.*)

Upon a dissolution of partnership, the defendant agreed to pay his co-partners 6817*l.* 9*s.* 8*d.*, as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891*l.* 12*s.* due from the firm to *H.* After the dissolution, they became bankrupts, and never paid *H.* *Held*, that in an action by their assignees for the 6817*l.* 9*s.* 8*d.*, the defendant could not set off their undertaking to pay the 51,891*l.* 12*s.* to *H.* *Abbott v. Hicks*, 5 Bing. N. C. 378; *S. C.* 7 Scott, 715.

*(In Actions by Assignees.)*

To an action by assignees for the price of a phaeton, for which the defendant had agreed to pay ready money, defendant pleaded a set-off, in respect of a bill of exchange drawn by *H.*, accepted by the bankrupt, and indorsed by *H.* to the defendant. Plaintiffs replied, that after the bill was dishonoured, *H.* indorsed it to defendant without consideration, in trust that defendant should purchase the phaeton of the bankrupt, hand it over to *H.*, and fraudulently attempt to set off the bill against the price of the phaeton. *Held*, a sufficient answer to the claim of set-off. *Lackington v. Coombes*, 6 Bing. N. C. 71; *S. C.* 8 Scott, 312.

*(Of Debt against a Legacy.)*

*T. B.* was indebted to *C. B.*, his sister, in the sum of 1878*l.* He became bankrupt, and shortly after his bankruptcy *C. B.* made her will, whereby she gave legacies of 500*l.* and 2000*l.* to her executors, in trust to pay the interest thereof (as to the 500*l.*) after the decease of her mother, to *T. B.* for his life, without power of anticipation, and free from his debts; and after his decease, to pay the principal to such persons as he should appoint; and in default of appointment, to his executors and administrators for his and their own use and benefit. *T. B.* died, without having obtained his certificate, and without having attempted to make any appointment. *Held*, that the

executors of the testatrix had no right to set off the debt due from *T. B.* to the testatrix against the legacies, but that the assignee of *T. B.* was entitled to so much of the legacies as the assets were sufficient to pay. *Cherry v. Boulbee*, 2 Keen, 319.

## SHARES IN JOINT STOCK COMPANY.

See EQUITABLE MORTGAGE.

## SHERIFF.

In an action against a sheriff for a false return of *nulla bona* to a writ of *faci facias*, in which the question is, whether the goods of the debtor had passed to his assignees under his bankruptcy,—the defendant need not put in the deposition of the petitioning creditor, to show what the petitioning creditor's debt was; nor is the defendant limited to the debt, only, which is stated in the deposition of the petitioning creditor. *Birt v. Stephenson*, 8 Car. & P. 741.

The stat. 2 & 3 Vict. c. 29. has a retrospective operation, so as to protect the sheriff from liability in respect of a *bonâ fide* execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the fiat issued, before the passing of the act, but the assignees were not appointed until afterwards. *Nelstrop v. Scarisbrick*, 6 Mee. & W. 684.

## SHIP.

*D.*, being captain of a ship bound to the East Indies and proprietor of the cabin furniture, deserted the ship at Algoa Bay; when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On the 18th October, while the ship was on her voyage home, *D.*, being indebted to the owner, gave him a written order as follows:—"I hereby authorize you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th December, and a fiat in bankruptcy was issued against *D.* on the 18th, on an act of bankruptcy committed on the 2d. *Held*, that *D.*'s assignees could not recover against the owner, in trover for the cabin furniture. *Belcher v. Oldfield*, 6 Bing. N. C. 102; *S. C.* 8 Scott, 221.

## SOLICITOR.

*(Alleged Negligence.)*

Upon a petition by a bankrupt to annul a fiat issued by an attorney for the amount of his bill of costs, on the ground, that the chief part of the bill consisted of charges for the prosecution of an action on the part of the bankrupt, in which he was nonsuited by reason of the gross negligence of the attorney; the Court referred it to the registrar, to enquire and report as to the quantum of ne-

gligence. *Ex parte Southall, re Southall*, 4 Deac. 91; *S. C.* Mont. & C. 346, 656.

*(Lien of.)*

The solicitor to the petitioning creditor has an equitable lien on money in his hands belonging to the assignees, for the amount of the petitioning creditor's bill of costs; and, although the solicitor might not have a right to set off the amount of such costs in an action at law by the assignees, yet the Court will not annul a fiat sued out by the solicitor against one of the assignees, on the ground that the sum so retained by the solicitor ought to be deducted from the debt on which the fiat was taken out. *Ex parte Smythies, re Southall*, 4 Deac. 118.

Where a person in insolvent circumstances, being pressed by particular creditors, employed an attorney to endeavour to effect an arrangement with all his creditors; but, that failing, the attorney advised that his goods should be sold by auction, and that he should go through the Insolvent Debtors' Court, in order that his effects might be rateably divided amongst his creditors; and the goods were sold accordingly, and the proceeds were, with the insolvent's assent, paid over by the auctioneer to the attorney, who (after making several payments to and on account of the insolvent) retained against the assignees the whole amount of his bill for the business done for the in-

solvent: *Held*, that this was not a voluntary transfer or delivery of that sum by the insolvent to the attorney, within the 7 *Geo. 4. c. 57. s. 32.*, there being no proof that it was intended that he should hold the proceeds for his own benefit, or for the benefit of any particular creditors, or otherwise than as the agent of the insolvent. *Wainwright v. Clement*, 4 Mees. & W. 385.

(Competency, as a Witness.)

*Quære*, Whether the solicitor to the petitioning creditor is a competent witness to prove the act of bankruptcy before the Commissioners. *Ex parte Rhodes, re Rhodes*, 4 Deac. 125; *S. C. Mont. & C. 319.*

(Deposit of Deeds by.)

Where, on a petition of an equitable mortgagee for a sale, it was alleged that the deed was deposited by a party "acting as the solicitor of the bankrupt;" this was held not a sufficient allegation of any actual authority given by the bankrupt to deposit the deed. *Ex parte Coleman, re Hood*, 4 Deac. 242.

STATE OF FACTS.

On a reference to the registrar, it is not incumbent on a party to bring in a formal state of facts, if it is not required by the registrar. *Ex parte Smythies, re Southall*, 4 Deac. 110; *S. C. Mont. & C. 346, 656.*

STATUTES.

*And see* RELATION TO ACT OF  
BANKRUPTCY.

(Operation of.)

The 127th section of the 6 *Geo. 4. c. 16.*, which declares that the future effects of a bankrupt, who does not pay 15*s.* in the pound under a second commission, shall vest in the assignees, operates retrospectively,—so as to include within its provisions a second commission that was issued before the passing of the act. *Young v. Riskworth*, 8 Adol. & E. 470.

But the 6 *Geo. 4. c. 16. s. 127.* does not apply, where the *certificate* under the second commission was obtained before the act. *Benjamin v. Belcher*, 3 Per. & D. 317; *S. C. 11 Adol. & E. 250.*

The statute 2 & 3 *Vict. c. 29.*, touching executions against bankrupts, is retrospective. *Luckin v. Simpson*, 6 Bing. N. C. 353.

STAYING PROCEEDINGS.

Where, after the judgment of the Court of Review had been reversed on a special case by the Lord Chancellor, and the matter referred back for consequential directions, one of the parties had obtained leave from the Lord Chancellor to appeal to the House of Lords, unaccompanied by any Order as to stay of proceedings: *Held*, that this had not the effect of staying the proceedings, although it was a circumstance to guide the Court in the exercise of its discretion, whether it

would make any consequential Order, till the appeal was determined. *Ex parte Pollard, re Courtney*, 4 Deac. 275; *S. C. Mont. & C. 239, 253, 643.*

#### STOPPAGE IN TRANSITU.

*Quære*, Whether a vendor of goods has a right to stop them *in transitu*, where the vendee is neither bankrupt nor insolvent. *Wilnhurst v. Bowker*, 7 Scott, 561.

#### STOCK.

Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the Court of Exchequer, on a bill filed by the assignees against the Bank of England, ordered the Bank to erase from their books the fictitious name, and insert that of the bankrupt. *Green v. Bank of England*, 3 Younge & C. 722.

#### SUBSTITUTION OF DEBT.

*See* PETITIONING CREDITOR.

#### SUIT IN EQUITY.

*And see* ACTIONS AND SUITS.

Assignees, in instituting a suit in equity, proceed at the peril of costs, and the Court will not stay it, on the petition of creditors objecting to its being continued; but will refer it to the Commissioners, to enquire how much of the assets ought to be retained by the assignees to abide the result of the suit. *Ex parte May, re*

*Jones*, 4 Deac. 60; *S. C. Mont. & C. 285.*

#### SUPERSEDEAS.

The Court declined to act on a certificate of Commissioners made eleven years ago, without first sending it back to them for review. *Ex parte Marindin, re Marindin*, 4 Deac. 57; *S. C. Mont. & C. 282.*

Where the bankrupt applies to supersede an old commission, on compounding with his creditors for the residue of their debts, and the assignees are dead; there must be a new choice of assignees, and the bankrupt must proceed under the composition contract clauses of 6 Geo. 4. c. 16. s. 133. 134. *Ex parte Monk, re Monk*, 4 Deac. 262.

#### SURETY.

Where, after proof of a debt, a surety pays part of it to the creditor, but not in discharge of the whole debt, the creditor may receive dividends on the full amount of his proof. *Ex parte Coplestone, re Snell*, 4 Deac. 54; *S. C. Mont. & C. 264.*

If a creditor receive dividends upon a debt partly secured by the guarantee of a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied rateably to the whole debt; and the surety is relieved from the creditor's claim, by the amount of the dividends on the part which is secured. *Raikes*

v. *Todd*, 8 Adol. & E. 846; *S. C.* 1 Per. & D. 138.

A discharged insolvent is liable to repay his surety, who pays for him after his discharge an annuity due before. *Abbott v. Bruere*, 5 Bing. N. C. 598; *S. C.* 7 Scott, 753.

### SURRENDER.

A bankrupt was permitted to surrender to a commission issued twenty-three years ago, where no fraud was imputed to him in not having previously surrendered; he paying the costs of the meeting for that purpose. *Ex parte Tarleton, re Tarleton*, 4 Deac. 178.

The Court has jurisdiction, after the time for surrendering prescribed by the statute has passed by, to direct the Commissioners to accept the surrender of the bankrupt. *Re Morgan*, 1 Drury & Walsh (Irish), 582.

### TAXATION OF COSTS.

Where an Order for the taxation of a solicitor's bill is not obtained until after his death, his administratrix is not liable to the costs of taxation, although more than a sixth is taken off; nor are such costs the subject of set-off. *Ex parte Hammond, re Jackson*, 4 Deac. 48; *S. C.* Mont. & C. 156.

On a reference to the registrar to tax a solicitor's bill of costs, and ascertain what is due in respect of such bill, he is bound to inquire into the existence of an alleged agreement of

the solicitor to charge only costs out of pocket, and to take such agreement into consideration, in ascertaining what is due on the bill. The registrar having omitted to do so, the matter was referred back to him for this purpose. *Ex parte Southall, re Southall*, 4 Deac. 95; *S. C.* Mont. & C. 346, 656.

On a reference to the registrar to tax the costs of an action brought by assignees, he may tax the costs of an application to this Court for an Order to substitute another petitioning creditor's debt, for the purpose of enabling the assignees to recover in such action. *Ex parte Smythies, re Southall*, 4 Deac. 114; *S. C.* Mont. & C. 346, 656.

An exception to the registrar's certificate on an Order for taxation of costs, on the ground that he has not made a sufficient allowance in respect of certain items, must state how much he actually has allowed. *Ibid.*; 4 Deac. 117.

### TIME.

#### (Computation of.)

The 1 & 2 Vict. c. 110. s. 8. enacts, that if a trader, after an affidavit filed and proceedings taken against him by his creditor, omits to enter into a bond &c., he shall be deemed to have committed an act of bankruptcy, provided a fiat shall issue against him within two calendar months from the filing of the affidavit. *Held*, that the day of filing the affidavit is to be reckoned the first day of the two months.



*Ex parte Whitby, re Whitby*, 4 Deac. 139; S. C. Mont. & C. 671.

### TROVER.

See ACTION—EVIDENCE—FIXTURES  
—VENDOR AND PURCHASER.

### TRUSTEE.

A petition to prove against a bankrupt trustee alleged various breaches of trust. *Held*, that the Court could only make the common Order for the petitioners to go in and make such proof as they were able. *Ex parte Smith, re Clarke*, 4 Deac. 123; S. C. Mont. & C. 347.

On the appointment of new trustee, without the usual reference, there must be an affidavit as to his fitness for the appointment. *Ex parte Palmer, re Peach*, 4 Deac. 177; S. C. Mont. & C. 364.

The appointment of a new trustee in the room of a bankrupt trustee is quite a matter of course, if urged by the parties beneficially interested. *Ex parte Smith, re Dry*, 4 Deac. 214.

The bankruptcy of a trustee is a sufficient ground for his removal from that office, although he has obtained his certificate, and the trust property is in the hands of a receiver. *Bainbrigge v. Blair*, 1 Beav. 495.

### UNLIQUIDATED DAMAGES.

See PROOF.

### USE AND OCCUPATION.

See LEASE.

### USURY.

The petitioner lent the bankrupt 1600*l.* on his promissory note, payable three months after date, renewable for the same period, at the option of the bankrupt; but so as not to exceed the period of eighteen months in the whole; the bankrupt undertaking to pay 7½ per cent. interest, and 3 per cent. insurance. The note was renewed four times successively; and on each renewal the same rate was deducted for interest and insurance. *Held*, that this transaction was protected by the 3 & 4 Will. 4. c. 98. s. 7., which allows any interest to be taken on a bill or note not having more three months to run, and was consequently not usurious. *Ex parte Terrewest, re Poynter*, 4 Deac. 144; S. C. Mont. & C. 146, 351; reversing the decision of Court of Review, 3 Deac. 590.

### VENDOR AND PURCHASER.

And see STOPPAGE IN TRANSITU.

*B.*, a builder, contracted with *A.* and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and covenanted to complete certain portions of the work within certain specified periods, being paid by instalments of corresponding dates; and that if he should neglect to complete any portion within the time limited, he should forfeit and pay the

sum of 250*l.* as liquidated damages. The agreement then contained a clause empowering the trustees, in case (*inter alia*) *B.* should become bankrupt, to take possession of the work already done by him, and to put an end to the agreement, which should be altogether null and void; and that the trustees, in such case, should pay *B.*, or his assignees, only so much money as the architect of the company should adjudge to be the value of the work actually done and fixed by *B.*, as compared with the whole work to be done. The course of business, during the progress of the work, was for the clerk of the works to inspect every article which came in under the contract, and none were received, except on his approval. After the works had proceeded for some time, *B.* became bankrupt. Before his bankruptcy, certain wooden sash frames had been delivered by him on the premises of the company, approved by the clerk of the works, and returned to *B.* for the purpose of having iron pulleys, belonging to the trustees, affixed to them; and at the time of the bankruptcy, these frames, with the pulleys attached to them, were at *B.*'s shop. He afterwards, but before the issuing of the fiat, re-delivered them to the trustees, and the sash frames being afterwards demanded of them by *B.*'s assignees, they gave an unqualified refusal to deliver them up.

*Held*, 1st. That the property in the wooden sash frames had not passed

to the trustees, at the time of the bankruptcy.

2ndly. That they were not entitled to retain them under the agreement, as being work already done, they not having been fixed to the hotel; but that even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bankruptcy, whereas the option of the trustees was not to be exercised until after the bankruptcy.

3rdly. That the refusal of the trustees not having been limited to the pulleys, the demand and refusal were sufficient evidence of a conversion by them of the wooden sash frames, so as to entitle *B.*'s assignees to recover them in trover. *Tripp v. Armitage*, 4 Mee. & W. 687.

#### VENUE.

What justifies a change of venue, as to the direction of the fiat. *Re Haines*, 4 Deac. 47.

Under what circumstances the venue of the fiat will be changed. *Re Geach*, 4 Deac. 57; *S. C. Mont & C.* 145.

Order made to change the direction of the fiat, under very special circumstances. *Re Graham*, 4 Deac. 212; *S. C. Mont. & C.* 639.

Venue refused to be changed to London, although creditors to the amount of 18,000*l.* resided there, and only one of importance in the place to which the fiat was directed. *Ex parte Knowles*, 4 Deac. 213.

Order made for change of venue under special circumstances. *Ex parte Lycett, re Wild*, 4 Deac. 272; S. C. Mont. & C. 642.

#### VIVA VOCE EXAMINATION.

A *viva voce* examination will not be granted, merely because some parties have previously stated facts, which they afterwards refuse to depose to on affidavit. *Ex parte Goodbody, re Freeman*, 4 Deac. 59; S. C. Mont. & C. 283.

#### VOLUNTARY TRANSFER.

See FRAUDULENT PREFERENCE.

#### VOLUNTARY CONVEYANCE.

*B.*, being in insolvent circumstances, and having several executions in his house, to satisfy which all his goods must have been sold, at the suggestion of one of the execution creditors, assigned to him all his effects, in trust for the general benefit of his creditors who should come in and sign the deed. The deed recited, that *B.* "had proposed" to execute such assignment. The assignee paid the sheriff's officer the amount of the executions, and he withdrew from possession. Several of the execution creditors signed the deed. Within three months after the assignment, *B.* went to prison, and subsequently was discharged under the insolvent act. *Held*, that the assignment was not voluntary, within the meaning of the 7 Geo. 4. c. 57. s. 32. *Knight v. Fergusson*, 5 Mee. & W. 389.

A party largely indebted makes a voluntary settlement, and becomes insolvent within three years: *Held*, sufficient to avoid the settlement, under the 13 Eliz. c. 5.; and held also, that in order to set it aside, it was not necessary to prove that the settlor was in a state amounting to insolvency. *Townshend v. Westacott*, 2 Beav. 340.

A bill alleged, that the settlor, at the time of making a voluntary settlement, was greatly indebted; but it did not state the particulars of the debts, but referred to a schedule of the settlor in the Insolvent Court in aid of the suit. *Held*, that the existence of the debts was not sufficiently put in issue, as against an infant; but an inquiry was directed on the point. *Ibid.*

A conveyance made to a creditor for a valuable consideration, sufficiently strong in itself to influence the debtor to make it, is not "voluntary," within the stat. (7 Geo. 4. c. 57, s. 32.) for relief of insolvent debtors, though part of the consideration consists of a pre-existing debt. *Margerison v. Saxton*, 1 Younge & C. 525.

A conveyance by a trader of part of his property for the benefit of his creditors, is not an act of bankruptcy, unless executed under circumstances of fraud; and mere conjecture of fraud, arising from extrinsic circumstances, will not be sufficient to affect the title under such conveyance. *Cattell v. Corral*, 4 Younge & C. 228.

## WARRANT OF ATTORNEY.

Trover does not lie for the assignees of a bankrupt against a creditor, who sues out execution under a warrant of attorney not filed within twenty-one days, if the execution be completed before the act of bankruptcy. The remedy is by an action for money had and received, or by a special action on the stat. 3 G. 4. c. 39. *Brook v. Mitchell*, 6 Bing. N. C. 349.

## WIFE.

The discharge of the wife under the Insolvent Debtors' Act (7 Geo. 4, c. 57.) before marriage, is a bar to an action against husband and wife, in respect of one of the scheduled debts. *Storr v. Lee*, 9 Adol. & E. 868; S. C. 1 Per. & D. 633.

*Semble*, that where a discharged female insolvent acquires property, and marries, whereby the property vests in her husband, the statute affords no remedy by which it can be made available to her former creditors. *Ibid.*

In an action brought by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt, who has not obtained his certificate, but has released his assignees, is not a competent witness to prove the payment of a sum of money to the defendant by the bankrupt after his bankruptcy. *Williams v. Williams*, 6 Mees. & W. 881.

## WITNESS.

*And see WIFE.*

*Quære*, whether the solicitor to the petitioning creditor is a competent witness to prove the act of bankruptcy before the Commissioners. *Ex parte Rhodes, re Rhodes*, 4 Deac. 125; S. C. Mont. & C. 119.

A party, committed by the Commissioners until he shall submit himself as a witness, cannot, at any time when he chooses to submit, call upon them to sit for the purpose of taking his examination, without paying the costs of their sitting. *Re Stockwin*, 6 Nev. & M. 813.

In an action by assignees for money had and received against a sheriff, who has sold the goods of the bankrupt under an execution, and paid over the proceeds after notice of the alleged act of bankruptcy, the sheriff's officer who acted in the execution, (if he has given the usual indemnity bond to the sheriff) is not a competent witness for the defendant, under the stat. 3 & 4 W. 4. c. 42. s. 26. *Groom v. Bradley*, 8 Car. & P. 500.

*(Admissibility of Creditor.)*

In a suit by the assignee under the Insolvent Debtors' Act to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff; and he is not rendered competent by the 3 & 4 Will. 4. c. 42. ss. 26. 27. *Holden v. Hearn*, 1 Beav. 445.

But a creditor, who has sold his debt, is a competent witness in support of a fiat. *Pulling v. Meredith*, 8 Car. & P. 763.

*(Admissibility of Bankrupt.)*


*A.* and *B.* were copartners; *A.* retired, and *B.* took *C.* into partnership with him. That partnership was dissolved, and then *B.* became bankrupt. Held, that *B.* was not a

good witness to prove an agreement, alleged by *A.* to have been made with him by *B.* and *C.*, to indemnify him against the debts of the first partnership. *Warren v. Taylor*, 4 Sim. 599.

The defendant, who had put in his answer, but became bankrupt before the hearing of the cause, was examined as a witness for the co-defendant. *Whitbread v. Jordan*, 1 Younge & C. 303.

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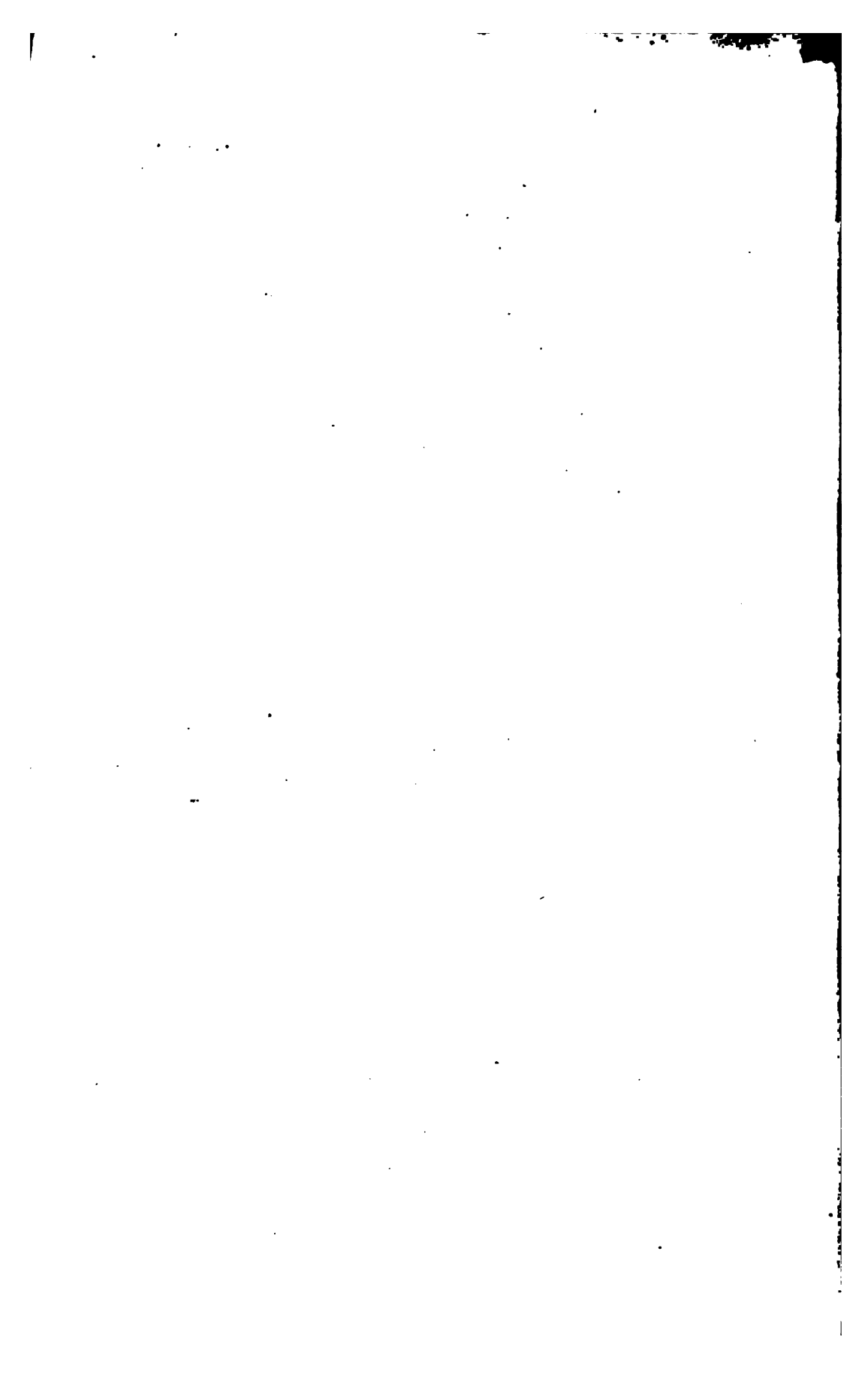












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